NO. 87-467

Supreme Court, U.S.
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In The
Supreme Court of the United States
August, 1987

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

vs

JOHN NELSON,
Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE FAILURE OF THE TRIAL COURT TO GIVE A DEFINITION OF THE TERM "TORTURE" AS AN AGGRAVATING CIRCUMSTANCE VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND STANDARDS ENUNUCATED IN FURMAN vs. GEORGIA 408 U.S., 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1982); COMMONWEALTH vs. ZETTLEMOYER 500 Pa. 16 454 A.2d 937 (1982), cert denied, 461 U.S. 970 103 S. Ct. 2444, 77 L. Ed. 2d 1327 (1983), COMMONWEALTH vs. PURSELL 495 A.2d 183 (Pa. 1985) and STATE V. DIXON Fla. 283 So. 2d 1 (1973).

II. DOES THE ACTION OF THE PENNSYLVANIA LEGISLATURE IN ENACTING 42 Pa. C.S.A. §9711(h) DEALING WITH THE STATE SUPREME COURT'S POWER TO REVIEW THE IMPOSITION OF A DEATH SENTENCE PROVIDING THAT A DEATH SENTENCE MAY BE VACATED AND A LIFE IMPRISONMENT SENTENCE IMPOSED WITHOUT A SENTENCING REHEARING VIOLATE THE DUE PROCESS CUARANTEES OF THE COMMONWEALTH/VICTIMS AND SURVIVORS OF HOMICIDE CASES CONSIDERING IN ALL OTHER TYPES OF CASES IN THE COMMONWEALTH WHEN A SENTENCE IS VACATED THERE IS A SUBSEQUENT REHEARING.

III. DOES THE ACTION OF THE PENNSYLVANIA LEGISLATURE IN ENACTING 42 Pa. C.S.A. §9711(h) WHICH PROVIDES THAT A DEATH SENTENCE MAY BE VACATED AND A SENTENCE OF LIFE IMPRISONMENT IMPOSED WITHOUT A REHEARING CONSTITUTE INVIDIOUS DISCRIMINATION AGAINST HOMICIDE VICTIMS/ SURVIVORS VIOLATING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

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PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT OF PENNSYLVANIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered on April 3, 1987 vacating the judgment of the Court of Common Pleas of Erie County, and remanding for imposition of a life sentence. Petition for reargument in the Supreme Court filed on the 23rd day of June, 1987. The Petition for reargument was denied.

OPINION BELOW

Respondent was found guilty by a jury in the Court of Common Pleas of Erie County, Pennsylvania of murder in the first degree and was given a death sentence by the jury after the jury had found one aggravating circumstance of torture which out weighed any mitigating factors. Respondent's conviction was appealed to the Pennsylvania Supreme Court on a direct appeal and the Supreme Court of Pennsylvania on April 3, 1987 vacated the judgment of the lower court

and remanded for imposition of a life imprisonment sentence. Petitioner filed a timely Petition for reargument which on June 23, 1987 was denied per curiam by the Pennsylvania Supreme Court at 43 W.D. Appeal Docket 1984.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1), an appeal from the final judgment of the State Court of last resort.

PARTIES

The caption of the case contains the names of all parties to the proceeding before the Supreme Court of the State of Pennsylvania.

REPORTS

The opinions of the Pennsylvania Supreme Court is reported at 43 W.D. Appeal Docket 1984 (J-148-1986).

STATUTES AND REGULATIONS INVOLVED

42 Pa. C.S.A. §9711(d)(8); Aggravating circumstances - aggravating circumstances shall be limited to the following: the offense was committed by means of torture.

42 Pa. C.S.A. §9711(h); Review of the death sentence - (1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules. (2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence. (3) The Supreme Court shall affirm the sentence of death unless it determines that :

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

Eighth Amendment to the United States Constitution.

Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On February 14, 1983 sometime after 8:30 p.m. the Respondent, John A. Nelson, killed his wife, Sara Nelson, by a series of attacks upon her, which included striking her with a claw hammer, stabbing her repeatedly with a wood chisel and ultimately strangling her with a cord. The victim was hit on the left side of the head above the ear with the claw end of an ordinary claw hammer. She was stabbed six times with a wood chisel, but only three of the thrusts actually punctured the chest area. After perpetrating these assaults, the Respondent went to another location and obtained an electrical cord. He returned to his victim

and strangled her with the cord. The pathologist who testified during the trial, indicated that the wounds by themselves would not have caused the victim's death. It was the stranglation with the electrical cord which brought about the victim's death. After a trial by jury on September 21, 1983, the Respondent was convicted of the crime of first degree murder, 18 Pa. C.S.A. §2501/2502 and Possession of Instruments of a Crime, 18 Pa. C.S.A. §907. In the sentencing hearing for the murder conviction, the jury fixed the penalty at death based upon the aggravating circumstances of torture 42 Pa. C.S.A. §9711(d)(8). The Respondent filed a Motion for New Trial and/or Arrest of Judgment which was briefed and argued and on April 17, 1984 the lower court denied the Respondent's Motion for New Trial and/or Arrest of Judgment and furnished a written Opinion which is included in the Appendix. A direct appeal was taken to the Supreme Court of Pennsylvania alleging among other issues that the lower court's charge to the jury during the sentencing phase of the trial was insufficient considering that there was no definition of the term "torture". Therefore, the

instruction was insufficient as a matter of law. In an Opinion and Order filed April 3, 1987, the Supreme Court in a four/three decision, vacated the judgment of the Court of Common Pleas of Erie County and remanded the case for imposition of a life sentence based on the failure of the trial court to give a definition of the term "torture" in its instructions to the jury. The Petitioner filed a Motion for reargument with the Pennsylvania Supreme Court and on June 23, 1987 the Petition for Reargument was denied per curiam.

This Petition for Writ of Certiorari is from the Order of the Pennsylvania Supreme Court dated June 23, 1987, denying the Petitioner's Petition for Reargument.

REASONS FOR GRANTING THE WRIT

The reason given by the majority of the Pennsylvania Supreme Court for the vacation of the death sentence was that the jury charge given during the sentencing phase of the instant case was prejudically deficient and that trial counsel was ineffective in his assistance when he failed to make a timely

objection to the charge. The majority of the Court felt that the trial court's failure to give a definition of the term "torture" an aggravating circumstance under 42 Pa. §9711(d)(8), which indicated that there must be more than a mere intent to kill to have a finding of "torture". Implicit in subsection 8 is the requirement of an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killer is not satisfied with the killing alone" (slip opinion). The majority in its Opinion attempted to distinguish, Commonwealth vs. Pursell, 508 Pa. 212 495 A.2d 183 (1985) by indicating that the lower court in Pursell, gave the jury a charge which contained a sufficiently guiding definition of the word "torture". However, the majority misapprehended a controlling relevant authority in Pursell which specifically stated that "when the means of torture are employed, we can believe, without a reasonable doubt, that the user of such means intended to torture his or her victim to death. What is intended to be included are those murders of the first degree where the actual commission of the offense included

such concurrent acts as to set the crime apart from the norm of capital felonies -- the consecienceless or pitiless crime which is unnecessarily painful to the victim (see State v. Dixon, Fla. 283 So. 2d 1 (1973), where the Supreme Court of Florida construed its death penalty statutes aggravating circumstance on "especially heinous, atrocious or cruel" as the consciencelessness or pitiless crime which is unnecessarily torturous to the victim")". Commonwealth vs. Pursell, 495 A.2d at 197.

Clearly, the majority in Pursell rejected the notation that the specific requirement of the term "torture" included a definition by the Court of the specific intent to cause additional pain and suffering.

It is clear that the Supreme Court in Commonwealth vs. Pursell, supra, clearly rejected the notation that specific intent to cause pain and suffering was a requirement for an aggravating circumstance of torture. The majority in Pursell went on to indicate that the specific aggravating circumstances of torture to be weighed by the jury

considering whether the death penalty should be imposed is a "sufficiently specific factor because we fell that the meaning of such a term is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended." Commonwealth vs. Pursell, 495 A.2d at 196.

The Pennsylvania Supreme Court realizes that any challenge to the sentencing code established in Pennsylvania must be evaluated in light of the requirements of Furman vs. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Furman imposes on the states the responsibility of drafting sentencing codes which would guide and channel the sentencing authorities discretion by resorting to the examination of specific factors that argue in favor or against the imposition of the dealth penalty. Total arbitrariness is thus eliminated in the imposition of a sentence of death. Pennsylvania's death penalty statute has already been challenged and upheld by the Pennsylvania Supreme Court and Certiorari has been denied in attacks related to the imposition of the death penalty under the drafted sentencing procedures

in Pennsylvania. Commonwealth vs. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert denied, 461 U.S. 970, 103 S. Ct. 2444, 77 L. Ed. 2d 1327 (1983).

The Pennsylvania Supreme Court has ruled that the sentencing procedures relating to the imposition of the death penalty are specific enough to satisfy the requirements of Furman. The Pennsylvania Supreme Court has also reviewed a challenge to 42 Pa. C.S.A. §9711(d)(8) in the above stated Commonwealth vs. Pursell. The language in Pursell dealing with the aggravating circumstances of torture, is quite clear in that the Pennsylvania Supreme Court indicated that the aggravating circumstance of the offense was committed by the means of torture (42 Pa. C.S.A. §9711(d)(8) is not vague. Accordingly, the jury is channelled from a totally arbitrary and capricious imposition of the death penalty." Commonwealth vs. Pursell, 495 at 196.

It is clear that the Pennsylvania Supreme Court has had held that the specific section of the Senetncing Code relating to imposition of the death penalty and the aggravating circumstances of torture clearly is not vague and therefore meets the requirements

as set forth in Furman vs. Georgia. The three judges of the Pennsylvania Supreme Court who dissented in the case at bar all indicate that the lower court properly instructed the jury as set forth in the sentencing procedures of 42 Pa. C.S.A. §9711. All the judges agree that there was sufficient evidence presented by the Petitioner during the course of the trial to establish that in fact that the victim had been tortured. The Pennsylvania Supreme Court erred in vacating the imposition of the death sentence in the case at bar since the Commonwealth's statutes dealing with the imposition of the death penalty has met constitutional muster and has been accepted and approved by the Pennsylvania Supreme Court. It is clear that the lower court followed all the mandates established by the statute relating to death penalty cases (42 Pa. C.S.A. §9711). However, in vacating the imposition of the death penalty in the case at bar, the Pennsylvania Supreme Court placed on the Commonwealth an unjust burden of anticipating a judicial change of heart. It is clear that the Pennsylvania Supreme Court in the case at bar did not

follow its own mandates set forth in Commonwealth vs. Pursell and also is attempting to hold the Commonwealth to an improper standard other than is set forth in Furman vs. Georgia. If as the Pennsylvania Supreme Court has determined in Commonwealth vs. Pursell, 42 Pa. C.S.A. §9711 (d)(8) is not void for vagueness and if torture "is a sufficiently specific factor because we feel that the meaning of such a term is a matter of common knowledge, so that an ordinary man would not have to guess at what was "intended" then their decision in Commonwealth vs. Nelson is clearly an error of constitutional proportions and is in conflict with Commonwealth vs. Pursell, Commonwealth vs. Zettlemoyer, Furman vs. Georgia and State v. Dixon and also in conflict with the legislature of Pennsylvania which established 42 Pa. C.S.A. §9711.

42 Pa. C.S.A. §9711(h) sets forth that in a review of death sentences by the Pennsylvania Supreme Court it shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence. The

Petitioner believes that we should be permitted to set forth to a jury the facts which we believe would establish that this killing was committed by an aggravating circumstance, that being "torture" and to have a jury empaneled at which time they could decide the sentence of the Respondent, which was the intention of the legislature by creating the sentencing phase of a capital case wherein a jury would decide the sentence. In the case at bar, the Pennsylvania Supreme Court vacated the death sentence even though by its own acknowledgement there was sufficient evidence to establish the aggravating circumstances of "torture" beyond a reasonable doubt. The Commonwealth victims/ survivors of homicide cases are denied the opportunity to see that due process is done not because the Respondent was denied any rights, but simply because of a disagreement as to a definition of torture. It is clearly established in Pennsylvania that in all non-capital cases where the sentence is vacated by an appellate court, the case is remanded to the lower court for resentencing. In doing so, the appellate court recognizes that there is no violation of a

defendant's double jeopardy right and it is clear that the sentencing function should be left to the sentencing judge. In a capital case, the jury determines the penalty to be inflicted upon an individual and it can only be guided by the trial court and the trial court's direction. If a jury is not given that opportunity, then it is clear that the legislature's intent to have the citizens of the Commonwealth of Pennsylvania determine the sentences to be imposed in capital cases is clearly defeated. The Pennsylvania Supreme Court by vacating the sentence of death and imposing a sentence of life imprisonment without giving a jury the opportunity to rehear the factors in order to make a determination as to what the sentence in fact should be, clearly is discriminating against a clearly defined group of individuals. This invidious discrimination rests with victims and survivors of homicide cases who are not given the opportunity to equal protection under the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

Further, the citizens of the Commonwealth of Pennsylvania as well as the victims/survivors of homciide cases are denied due process of law. The reasons set forth for the remand for the imposition of a life imprisonment sentence are set forth in 42 Pa. C.S.A. §9711(h)(3). The legislature established three separate reasons in which the Supreme Court of Pennsylvania could vacate a death sentence and remand for the imposition of a life imprisonment sentence. Those reasons are: (i) the sentence of death was a product of passion, or prejudice, or any other arbitrary factor; (ii) the evidence failed to support the finding of an aggravating circumstance specified in (d); or (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant. An examination of the record of the case at bar and the evidence presented at trial, clearly establishes that none of those three reasons have been established by the Pennsylvania Supreme Court. The error that was set forth by the majority Opinion

dealt with the lower court's failure to properly define the term "torture". That factor is not contained in the three factors which would allow the Pennsylvania Supreme Court to vacate and remand for the imposition of the life sentence. It appears that the Pennsylvania Supreme Court in remanding for the imposition of a life sentence is violating the legislature's intent that a jury determine the penalty to impose in a capital case in Pennsylvania. It is clear that the legislature's intent was to have a jury of the Respondent's peers determine what the sentence would be in a capital case under clearly defined circumstances. It would appear that if in fact the lower court committed an error by failing to properly instruct the jury on "torture", then the remedy should require that a jury determine the sentence to be imposed under the definition of "torture" as determined by the Pennsylvania Supreme Court. There is no compelling state interest in circumventing the legislature's intent of having a jury determine the sentence to be imposed. It is clear that if the case was remanded for a resentencing

hearing, a defendant would not be denied due process or equal protection of the law as long as the requirements set forth in the sentencing guidelines were again followed by the jury in making its determination.

It is clear that the Commonwealth would be put to an expense in relitigating the sentencing phase of a capital case. However, to ensure that due process and equal protection of law is provided to this suspect class of individuals, that being victims/survivors of homicide cases, that minimal expense is far out weighed by the rights of those individuals. It is obvious that the Commonwealth of Pennsylvania does not consider the financial aspects of retrials or resentencing procedures guaranteed to defendants for violations or error occurring during the course of their trials or sentencings in non-capital cases. Therefore, the same right and privilege must be guaranteed to victims/survivors of homicide cases. Further, it is unjust to set apart defendants in homicide cases in such a manner as to afford them the luxury of escaping a sentence of death simply because

of an error committed during the course of their sentencing hearing. It would appear that if the logic applied to capital cases and the vacation of death sentences and the imposition of life sentences were to be applied to non-capital cases, then defendants who had their sentences vacated in a non-capital case should then be given probationary sentences without the necessity of a rehearing.

It is quite clear as in the case at bar, that the imposition of a death sentence is quite justified. The Respondent appears to have been able to avoid the just punishment for his offense simply because of an alleged error committed by the trial court. Since the alleged error that the trial court committed was not covered under any of the factors set forth in 42 Pa. C.S.A. §9711(h) and in order to guarantee due process and equal protection the proper remedy should be the remanding of the case to the Erie County Court of Common Pleas of the Sixth Judicial District of Pennsylvania for a rehearing so that a jury can impose a sentence as set forth in 42 Pa. C.S.A. §9711

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the judgment of the Supreme Court of Pennsylvania entered herein.

Respectfully submitted,

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APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	
vs	:	OF ERIE COUNTY, PENNA.
	:	CRIMINAL DIVISION
JOHN NELSON	:	NO. 559 A & B of 1983

O P I N I O N

Anthony, J., April 17, 1984.

Defendant, John Andrew Nelson, was tried and convicted of the crime of first degree murder, 18 Pa. C.S. §§2501-2502, and of possession of instruments of crime, 18 Pa. C.S. §907. In the sentencing hearing for the murder conviction, the jury fixed the penalty at death based on the aggravating circumstance of torture, 42 Pa. C.S. §9711(d)(8).

The defendant has filed a motion for new trial and/or arrest of judgment, which we now consider.

On February 14, 1983, sometime after 8:30 p.m. the defendant John Andrew Nelson killed his wife, Sara Nelson, by a series of attacks upon her, which included striking her with a claw hammer, stabbing her repeatedly with a wood chisel and ultimately strangling her with a cord. Many of the details of this brutal homicide are uncertain, but the following facts can be gleaned from the testimony at trial.

The defendant was released from Doctor's Osteopathic Hospital in the early evening of February 14, 1983.

Defendant testified that he was released at 5:00 p.m. and went looking for his wife at her place of employment. Unable to find her there, defendant went drinking at various bars. Defendant claims that he consumed six to ten beers prior to meeting his wife at her home sometime after 8:00 p.m.

Defendant's girlfriend, Lottie Skrzypa Boyles, tells a slightly different story. She said that she picked up the defendant near the hospital a little after 7 P.M. and dropped him off near his wife's home. If her story is believed, defendant could not have consumed the six to ten beers that he alleges.

In any event, sometime after 7 P.M., defendant went to Mentley's Bar where he met David Fuller, an ex-police officer. In the course of their conversation, defendant said he was mad at his wife and asked what the penalty for murder was. Though the defendant was drinking, Fuller did not think he was intoxicated.

After meeting his wife, defendant persuaded her to drive him over to Henri's Beauty Parlor at approximately 8:30 P.M. This was the last time the victim was seen alive.

While at the beauty parlor, the fatal attack occurred. The victim was hit on the left side of the head above the ear with the claw end of an ordinary claw hammer. She was stabbed six times with a wood chisel, but only three of these thrusts actually punctured the chest area. After perpetrating these assaults, the defendant went upstairs to the main area of the beauty parlor and obtained an electrical cord. Taking it downstairs, he strangled his wife with the cord. Dr. Jack Rozwadowski, a pathologist at Hamot Hospital, testified that the wounds by themselves would not have caused the victim's death. It was the strangulation with the electrical cord which brought about Sara Nelson's death.

After the slaying, the defendant disposed of his wife's car by driving it to his mother-in-law's residence. A little later, the defendant called his step-daughter asking where the victim was.

After his arrest, the defendant confessed to the homicide numerous times. He told Ms. Boyles, his girlfriend, George Shoemaker, a bartender at Zurn's Tavern, and David Zanni, a cab driver, about the killing. Shortly after 11 P.M., he then called the Millcreek Township Police Department and confessed to the murder.

While in the custody of Officer Love, and without any prompting from the officer, defendant twice blurted out that he had killed his wife. Later at the Millcreek Township Police Station, he twice admitted killing his wife. Immediately prior to these latter two admissions, at 12:15 a.m. and 1:05 a.m. on February 15, 1983, he was advised of his Miranda rights and he orally acknowledged understanding them.

The defendant's memory of his participation in the killing only began to grow blurry when he was interrogated at 3:05 a.m. on February 15. Since that time the defendant has maintained that he cannot remember killing his wife, although he remembers almost every other detail of the evening.

Finally, defendant was arraigned on the homicide and possession charge at approximately 4:45 a.m. on February 15, less than six hours after his arrest.

I. CLAIMS OF ERROR - POSSESSION OF INSTRUMENTS OF CRIME CONVICTION

The defendant has abandoned his motion for new trial and/or arrest of judgment with respect to his conviction for possession of the instruments of crime

by failing to brief or argue this contention at the hearing on the post-trial motions. Commonwealth v. Williams, 476 Pa. 557, 570, 383 A.2d 503, 509-10 (1978); Commonwealth v. Manigault, 501 Pa. 506, ____, 462 A.2d 239, 241 (1983).

II. ALLEGATION THAT VERDICT WAS CONTRARY TO LAW

For a verdict to be contrary to law, "it must appear that the verdict is not consistent with any of the alternatives properly before the jury under the charge of the court." Commonwealth v. Ashford, 227 Pa. Superior Ct. 351, 354-55, 322 A.2d 722, 723 (1974). In this case, the defendant was convicted of first degree murder and possession of the instruments of crime, both of which were alternatives available to the jury. Consequently, the verdict was not contrary to law.

III. ALLEGATION THAT COURT ERRED IN ALLOWING COMMONWEALTH TO INFER THAT AN "ALIBI" DEFENSE WAS BEING ASSERTED.

The defendant alleges that the Commonwealth inferred that an "alibi" defense was being asserted in its opening and closing statements.

It is true that the Commonwealth did mention "alibi" in both its opening and closing statements. However, both references must be looked at in context.

In the opening statement, the assistant district attorney told how the defendant called Ms. Dina at 9:30 p.m. on the night of the murder. The assistant district attorney then stated "Mr. Nelson at this point is laying up the scene, he is setting up an alibi. At that point in time, Sara Nelson is probably dead." (TT, Vol. I, p. 14).

In the closing argument, the assistant district attorney again talked about the call to Ms. Dina and mentioned the defendant's disposal of his wife's car. He said that the defendant was planning an alibi.

Looking at both of these statements in the context in which they were spoken, the Commonwealth was referring to the defendant's behavior on the night of the killing. One could reasonably infer that the defendant was trying to concoct an alibi. The Commonwealth brought this matter up not to attempt to shift any burdens of proof, but rather to attempt to show that the defendant was conscious of his wrongdoing

and that he had planned the crime. As such, the Commonwealth's remarks were fair deductions from the evidence that it presented at trial. See, Commonwealth v. Galloway, 302 Pa. Superior Ct. 145, 160, 448 A.2d 568. 576 (1982); Commonwealth v. Cronen, 464 Pa. 138, 346 A.2d 59 (1975).

Even if we believe that the Commonwealth's use of the word "alibi" was improper, a new trial would not be warranted unless the unavoidable effect of the remarks "is to so prejudice the jury against the accused and prevent the finding of a true verdict." Commonwealth v. Betrand, 484 Pa. 511, 517, 399 A.2d 682, 685 (1979) (opening statement); Commonwealth v. D'Ambro, 500 Pa. 303, 310, 456 A. 2d 140, 144 (1983) closing statement).

Viewing all the evidence, we do not believe that the remarks prejudiced the jury so as to prevent the finding of a true verdict. Evidence was presented of defendant's numerous confessions, of blood of his type being found at the scene of the crime, of his asking Mr. Fuller what the penalty for death was, and of the earlier threats to his wife. In light of this and other evidence, we do not see how the prosecution's use of the word "alibi" would have effected the verdict.

We therefore find no error warranting the granting of a new trial.

IV. ALLEGED ERROR IN FAILURE TO APPOINT A SPECIAL PROSECUTOR

The defendant claims that he should be granted a new trial because his right to a fair trial was prejudiced in that a special prosecutor was not appointed. The particular occurrence which gave rise to this pre-trial request was that Shad Connelly, an Assistant District Attorney, had been present in the interrogation room at the Millcreek Township Police Department in the early morning hours of February 15, 1983 when the defendant made incriminating statements.

The defendant premises his argument for appointment of a special prosecutor on the allegation that it is prosecutorial misconduct for an assistant district attorney to participate in the investigation of a crime prior to the filing of charges. In particular he claims that this creates a bias against an accused. He further claims that an assistant district attorney's testimony about his investigation is given undue "credence and credibility" by a jury. He infers that this alleged misconduct is sanctioned by the District Attorney, and

that therefore the whole office should be recused and a special prosecutor appointed.

As a preliminary matter, we must decide whether a prosecutor may ever participate in the investigation of crime. The ABA Standards for Criminal Justice, Standards Relating to the Prosecutorial Function (1977), although not binding upon this Court, are persuasive in defining the proper role of the prosecutor. In the Standards, a limited investigatory function for the prosecutor's office is called for. Standards Relating to the Prosecutorial Function §3.1. We believe that within proper parameters that this is a proper role for the District Attroney's office.

The defendant , however, implies that by participating in an investigation prior to the filing of charges, the district attorney's office is biased against an accused. The defendant seems to believe that the district attorney's office cannot make an objective assessment of whether to drop the charges or pursue the case to trial or a plea agreement if an assistant district attorney had participated in a pre-charge investigation. We agree that an assistant district attorney should be objective.

However, an assistant district attorney as a professiona l can still be objective and participate in a limited investigation prior to the filing of charges.

This court will not try to define what are the proper limits to this limited investigatory role. We only hold that Attorney Connelly's conduct in this case falls within the proper limits. The only "investigation" that the Assistant District Attorney conducted was an observation of the defendant and the witnessing of the defendant's unelicited statement. Such a passive participation does not carry with it the threat of the assistant district attorney becoming so wedded to one particular point of view as to lose his objectivity.

In any event, the assistant district attorney recused himself because he was to be called as a witness. See, Pennsylvania Code of Professional Responsibility DR 5-102(A). This operated as a further assurance of the objectivity of the actual trial prosecutor.

We would reach the same result, if the defendant's argument was construed to attack the assistant district attorney's conduct as creating an "appearance of impropriety". This standard as applied to the district

attorney's office was rejected by the Pennsylvania Supreme Court in Commonwealth v. Harris, 501 Pa. 178, 160 A.2d 747 (1983). The Court called instead for "a determination on a case by case basis of whether the acts of a public prosecutor have actually tainted the proceedings so as to require a new trial with a special prosecutor appointed rather than an absolute grant of one at any allegation of the 'appearance of impropriety.'" Id., at ____, 460 A.2d at 749; see also, Commonwealth v. Miller, 281 Pa. Superior Ct. 392, 422 A.2d 525 (1980).

The final basis for challenging the assistant district attorney's pre-charge investigation is that it allowed him to testify at trial where it is alleged that his testimony was given undue "credence and credibility". We do not see, nor does the defendant enlighten us, how the jury gave undue "credence or credibility" to the testimony of the assistant district attorney. He simply testified about what the defendant did and said while he was present in the interrogation room. As such, his testimony was no different from the police officers'. This Court does not see how his position would give his testimony greater "credence

and credibility" than the police officers' testimony.

Having considered all the arguments advanced by the defendant we find it was not error to deny his motion for appointment of a special prosecutor.

V. ALLEGED ERROR IN NOT SUPPRESSING DEFENDANT'S STATEMENTS

The defendant alleges that the Court erred in failing to suppress the various statements made by him while at the Millcreek Township Police Department in the early morning hours of February 15, 1983 and also the recorded statement made by him in the Erie County Prison in the late night hours of February 16, 1983. Because different considerations are involved in evaluating the statements made on the two different dates, we shall address the statements made on each day separately.

A. Statements Made on February 15, 1983

In challenging the voluntariness of his confessions, the burden is placed upon the Commonwealth to show the voluntariness of the confession by a preponderance of the evidence. Commonwealth v. Hunt, 263 Pa. Superior Ct. 504, 509, 398 A.2d 690, 692 (1979); Commonwealth v. Watts, ___Pa. Superior Ct.____,____, 465 A.2d 1288, 1290 (1983). "In determining the voluntariness of a

statement, the totality of the circumstances must be considered." Commonwealth v. Eackles, 286 Pa. Superior Court, 146, 151, 428 A.2d 614, 617 (1981); accord, Commonwealth v. Starkes, 461 Pa. 178, 184, 335 A.2d 698, 701 (1975).

In looking at the totality of the circumstances, we must not only consider what transpired while the defendant was in custody, but also what occurred prior to the arrest and at the arrest. In this case, the defendant without any prompting confessed to killing his wife to Lottie Skrzypa Boyles, George Shoemaker and David Zanni, prior to the arrest. The defendant then called the police dispatcher and told the police on his own volition that he had killed his wife. Then after the police arrived on the scene and arrested him, he twice blurted out to Officer Love that he had killed his wife. So we have in this case, a defendant who for whatever reason wanted to tell people about the crime he had committed. In reviewing the whole record, it appears that the defendant persisted in confessing until sometime after 2:00 a.m. This Court therefore believes that all of the statements made on February 15, arose from some desire

of the defendant to express himself, rather than from any actions taken by the police.

The defendant however claims that the police realizing that he had been hospitalized, should have inquired about the reason for the hospitalization. Such a per se rule of inquiry has been rejected by the courts. Commonwealth v. Cornish, 471 Pa. 256, 268, 370 A. 2d 291, 277 (1977; Commonwealth v. Hunt, 263 Pa. Superior Ct. 504, 510, 398 A.2d 690, 693 (1979). Instead we must look at the testimony of the defendant and the interrogating officers in determining what the surrounding circumstances were that could have effected the voluntariness of the statements. Commonwealth v. Jones, 457 Pa. 423, 433, 322 A.2d 119, 125 (1974); Commonwealth v. Hunt, 263 Pa. Superior Ct. at 510-11, 398 A.2d at 793.

Though the defendant testified to some disorientation, Officers Love, Orr and Andrews and Attorney Connelly all testified that they believed he was suffering from psychological disability and that he appeared to be mentally alert. In addition, Shoemaker, Boyles and Zanni also believe the defendant to be

relatively normal.

Though the defendant did become combative at several of the earlier interviews the testimony shows that he calmed down and was rational thereafter. Given all the testimony by the police officers and other witnesses we do not believe that the emotional outbursts show the defendant was psychologically disabled from making a voluntary statement. See, Commonwealth v. Hunt, 263 Pa. Superior Ct. at 511, 397 A.2d at 693.

The defendant further suggests that his alleged intoxication rendered his statements involuntary. Intoxication, in and of itself, is not dispositive of the voluntariness of a confession. Commonwealth v. Jones, 457 Pa. at 432-33, 322 A.2d at 125; Commonwealth v. Hann, 272 Pa. Superior 431, 435, 416 A.2d 533, 535 (1979). Instead, we must look at the totality of the circumstances.

We have the testimony of not only the interrogating and arresting officers and Attorney Connelly, but also of Boyles, Shoemaker and Zanni that while the defendant had obviously been drinking, he did not appear intoxicated.

Though the shackling and binding of a suspect in some circumstances may show an attempt to overbear the

the free will of the suspect, we do not believe that in this case the police when they shackled and bound the defendant intended to achieve such a result nor that their conduct did achieve such a result. As we mentioned previously, the defendant's statements seem to have arisen from some inner prompting, not some outside pressure.

The defendant suggests that the appearance of Assistant District (sic) Connelly at the interrogation room created some undue psychological pressure on the defendant to confess. This Court fails to see what psychological pressure is created by the presence of a member of the District Attorney's office which is not also created by the presence of police officers.

There seems to be a suggestion that the confessions were involuntary because of an alleged undue delay in arraignment. The Defendant , however, was arraigned within six hours of his arrest. Therefore the delay, in and of itself, is not a ground for suppressing the statements. Commonwealth v. Davenport, 471 Pa. 278, 286-87, 370 A.2d 301, 306 (1977).

Finally, the defendant seems to suggest that he was subjected to continuous interrogation. Instead, the

first interrogation session lasted about fifteen minutes and the second about five to fifteeen minutes. The final session took about an hour, but that was only because the defendant gave a long narrative statement. The interrogation therefore did not reach the egregious duration as occurred in Commonwealth v. Riggins, 451 Pa. 519, 304 A.2d 473 (1973) and Commonwealth v. Purvis, 458 Pa. 359, 326 A.2d 369 (1974). In this case, it only lasted for about one-and-one half hours spread over a four hour period.

In addition, between the interrogation sessions, the defendant was given a chance to rest and the police gave him cigarettes and coffee. These actions can "hardly (be) the type of police conduct which leads to a finding of involuntariness". Commonwealth v. Willman, 434, Pa. 489, 255 A.2d 534, 536 (1969).

Considering these factors, we do not find that the police conducted the interrogation in such a way as to overbear the defendant's free will.

In looking at the totality of the circumstances starting from the defendant's admission to Lottie Skrzypa Boyles, the Commonwealth has shown by a preponderance of the evidence that the defendant's

statements were the "product of an essentially free and unconstrained choice by its maker." Commonwealth v. Eackles, 286 Pa. Superior Ct. at 151, 428 A.2d at 617.

B. Statement Made On February 16, 1983.

The defendant challenges his February 16, statement as being involuntary because of the psychological pressure created by solitary confinement. However, solitary confinement, in and of itself, does not make a statement made by a defendant involuntary. Commonwealth v. Brown, 273 Pa. Superior Ct. 129, 416 A.2d 1123 (1979). We must look at the totality of the circumstances in making that determination. Commonwealth v. Schroth, 495 Pa. 561, 567, 435 A.2d 148, 151 (1981).

In this case, defendant was put in solitary confinement because of his self-professed suicidal tendencies. So the Commonwealth was not motivated by any intention to coerce the defendant by putting him in solitary confinement.

The fact that the defendant claimed to be suicidal does not mean that the defendant could not make a voluntary and rational statement. Detective Donowski, who recorded the statement, testified that the defendant

appeared alert and rational when he made his statement. On the tape itself, the defendant seemed to be responsive to the questions. Most important is the fact that if the defendant's will had been overborne, he would be expected to have made an inculpatory statement. Instead his statement was mostly exculpatory when compared to his earlier statements. The Commonwealth has thus sustained its burden of showing the voluntariness of this statement. See, Commonwealth v. Hunt, 263 Pa. Superior Ct. at 511, 398 A.2d at 693.

Defendant's counsel also suggests that the February 16 statement should be inadmissible because it was obtained from the defendant when counsel was not present, though the police knew the court had appointed counsel.

In this case, the defendant requested the police to come so that he could make a statement, and he knowingly and voluntarily waived his right to have counsel present. The courts have held that under such circumstances, the statement is admissible and does not violate any constitutional rights. Commonwealth v. Peoples, 483 Pa. 152, 156, 394 A. 2d 956, 957 (1978); Commonwealth v. Kesting, 274 Pa. Superior Ct. 79, 86, 417

A.2d 1262, 1265 (1979) (petition for allowance of appeal denied (1980)).

Consequently, we find that the February 16 statement was voluntary and not obtained in violation of the Constitution.

VI. ALLEGED ERROR IN NOT SUPPRESSING THE TESTIMONY OF HARRY HOLMWOOD

Harry Holmwood was a Deputy Sheriff who also worked as a prison guard. During the defendant's trial, he escorted the defendant to and from the trial and guarded him during the trial.

On Thursday, September 15, 1983, the first day of the trial, Officers Love and Skellie testified regarding the murder scene at Henri's Beauty Parlor. As the defendant was being led back to the prison, he remarked to Holmwood that the Officers had lied on the stand about the circumstances at Henri's. Holmwood had not said anything to the defendant to elicit this statement.

Holmwood told no one of the defendant's statement until Tuesday, September 20, 1983, when the defendant testified that he could not remember what had transpired at Henri's. Holmwood then approached the Assistant District Attorney who was trying the case during the noon

break to tell him of the defendant's statement. The Assistant District Attorney informed the defendant's counsel of this occurrence in the afternoon. That same afternoon, the prosecutor sought to call Deputy Sheriff Holmwood as a rebuttal witness whereupon this Court held a suppression hearing. After listening to arguments from both counsel, this Court denied defendant's motion to suppress, finding the statement voluntary.

The defendant challenges this decision on two grounds. First, he claims the testimony was inadmissible because the defendant was not advised of his Miranda rights. Secondly, he seeks to impute Mr. Holmwood's failure to disclose to the prosecution and claims that this failure to disclose is reversible error.

Miranda warnings need only be read to an accused or suspect prior to custodial interrogation. Miranda v. Arizona, 384 U.S. 436 (1966); Commonwealth v. Bracey, 501 Pa. 356, ____. 461 A.2d 775, 780 (1983). Since Mr. Holmwood did not interrogate the defendant, he did not need to inform the defendant of his Miranda rights. See, Rhode Island v. Innis, 446 U.S. 291 (1980; Commonwealth v. Bracey, supra.

Pa. R. Crim. P. 305 imposes a duty upon the Commonwealth to disclose to the defendant incuplatory statements made by him, of which the Commonwealth is aware. This duty however only arises when a pre-trial request for such information is made by the defendant. Pa. R. Crim. P. 305(B). If such a request is made, the Commonwealth has a continuing duty to disclose any such information which is uncovered during the trial. Pa.R.Crim.P. 305(D). However, when the defendant does not make a pre-trial discovery motion, as is the case herein, the Commonwealth has no duty to disclose inculpatory statements made by the defendant. Commonwealth v. Brocco, 263 Pa. Superior Ct. 51, 396 A.2d 1371 (1979).

Given the seriousness of this case, the Court deemed it necessary in the interest of justice to grant the defendant time to research the legal issues involved and the opportunity to call the defendant as a surrebuttal witness. Considering the nature of Mr. Holmwood's testimony, this was an adequate remedy.

After the suppression hearing, the voluntariness of the statement was never really in dispute. The only issues were whether the defendant made the statement, and

whether the testimony was admissible as a matter of law.

The defendant not only cross-examined Mr. Holmwood, but he was also allowed to be recalled as a surrebuttal witness, if he so desired. This remedied the factual question.

The defendant's counsel was granted a short recess to research the legal issues. The defendant did not then find nor has he subsequently found any authority for his contention that Mr. Holmwood's testimony should be suppressed as a matter of law. In the only case that the defendant cites, Commonwealth v. Thiel, ____Pa. Superior Ct.____. 470 A.2d 145 (1983), the Superior Court granted a new trial because the Commonwealth failed to produce key evidence of airplane tickets after the defendant had filed a Rule 305 motion, and the trial court granted no remedy to the violation of this rule. That case is inopposite because herein there was no Rule 305 violation, and the defendant was given sufficient time to prepare a defense to overcome any possible prejudice caused by the introduction of Mr. Holmwood's testimony.

Consequently, this court finds that the testimony of Mr. Holmwood was properly admitted.

VII. ALLEGED ERROR IN ADMITTING PHOTOGRAPHS OF THE VICTIM DURING THE SENTENCING PHASE.

During the sentencing phase of the trial, the Commonwealth presented four photographs taken of the victim at the scene of the crime. The defendant timely objected to admission of these photographs and now asserts that this Court erred in overruling his objection.

The black and white photographs, taken from various angles, show the various puncture wounds and ligature marks on the victim's body. However, the fact that the photographs were not in color but black and white thereby rendered them not unduly gruesome. In such a situation, our Supreme Court has stated, "When the trial judge is confronted with gruesome or potentitally inflammatory photographs, the test for determining their admissibility which he must apply is 'whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.'" Commonwealth v. Petrakovich, 459 Pa. 511, 521, 329 A.2d 844, 849 (1974) (quoting Commonwealth v. Powell, 428 Pa. 275, 278-279, 241 A.2d 119, 121 (1968) and

Commonwealth v. Peyton, 360 Pa. 441, 451, 62 A.2d 37, 41 (1948)).

During the sentencing hearing, the Commonwealth used the photographs to attempt to show that the victim had been tortured prior to death. Torture involves the intentional infliction of pain and suffering. Commonwealth v. Pursell, 67 Erie Co. LJ. 41, 69 (1983); Annot., 83 A.L.R. 3d 1222 (1978 and supp). The photographs by showing the wounds and ligature marks helped the jury to make a determination of the amount of pain and suffering experienced by the victim prior to her death. Such a determination is essential to the subsequent determination of whether torture was involved. To deter any possible prejudice, this Court gave cautionary instructions to the jury not to let the photographs inflame their emotions, but only to use them in evaluation whether torture had been imposed upon the victim. As such, the essential evidentiary value of the photographs clearly outweighed their prejudicial effect. See, Commonwealth v. Sullivan, 472 Pa. 129, 371 A.2d 468 (1977) (photographs admissible to show brutality of the murder to demonstrate the intent to kill); Commonwealth v. Vogel, 468 Pa. 438, 364 A.2d 274 (1976)

(photographs of victim at scene of crime admissible to show killing with malace); Commonwealth v. McCutchen, 499 Pa. 597, 454 A.2d 547 (1982); photographs of upper torso and anal area admissible to show "sodomy, as a motive for the killing, and the brutality of the beating, thus allowing an inference of intent to kill," id., at 601, 454 A.2d at 547); Commonwealth v. Edwards, 493 Pa. 281, 426 A.2d 550 (1981)(photograph of victim with knife handle protruding from the abdomen admissible to show force used to establish intent to kill).

VIII. ALLEGATION THAT VERDICT IS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

A. Guilt Portion of Trial

The test to apply in determining whether to grant a new trial on the ground that the verdict is against the weight of the evidence is whether the verdict is "so contrary to the evidence as to shock one's sense of justice and to make the award of a new trial imperative, so that right may be given another opportunity to prevail." Commonwealth v. Mitchell, ___Pa. Superior Ct. ___, ____, 465 A.2d 1284, 1287 (1983); accord, Commonwealth v. Fields, ___,Pa. Superior

Ct. ___, ____, 464 A.2d 375, 380 (1983).

Unlike a motion in arrest of judgment based on a challenge to the sufficiency of the evidence, we must look ar all the admissible evidence in determining whether the verdict is so contrary to the weight of the evidence to warrant a new trial.

The defendant appears to raise five grounds why he believes the verdict was against the weight of the evidence. First, he argues that he was so intoxicated that he was unable to have premeditated the homicide. Secondly, he claims that the killing was in the heat of passion. Thirdly, he appears to be arguing that his alleged chronic alcoholism has led to a diminished capacity to form the requisite intent for first degree murder. Fourth, he claims that his alleged lack of memory of the killing negates a showing of premeditation. Finally, he argues that the fact that he was hospitalized until hours before the killing shows that there was insufficient time for him to have premeditated the murder.

The fact of voluntary intoxication is irrelevant in a murder case except to the extent that it

negates the specific intent required for first degree murder, Commonwealth v. England, 474 Pa. 1,19-20, 375 A.2d 1292, 1301 (1977); 18 Pa. C.S. §308. In this case, the Commonwealth presented witnesses who saw the defendant either prior to the murder or shortly after the murder, and all thought he was not intoxicated. David Fuller, the ex-police officer, and the defendant's stepdaughter both saw the defendant prior to the killing and both thought he did seem intoxicated. Ms Boyles, Mr. Shoemaker and Mr. Zanni, all saw the defendant shortly after 9 P.M., which was after the murder was completed. All three witnesses testified that the defendant did not seem intoxicated. Given all this testimony, the jury's determination is not contrary to the weight of the evidence.

In a murder case, the defendant is entitled to have the jury instructed that they may find the defendant guilty of voluntary manslaughter, instead of murder. Commonwealth v. Zettlemoyer, 500 Pa. 16, 67, 454 A.2d 937, 964 (1982). The Commonwealth always has the burden of proving beyond a reasonable doubt all the elements of first degree murder. Commonwealth v. Walzack, 468 Pa. 210, 217, 360 A.2d 914, 917 (1976)

Commonwealth v. Green, 493 Pa. 409,____, 426 A.2d 614, 616 (1981). If the defendant alleges that the killing was the result of a "sudden and intense passion resulting from serious provocation", the Commonwealth must establish beyond a reasonable doubt that the killing was not due to the "sudden and intense passion" to warrant a first degree murder conviction. Mullaney v. Wilbur, 421 U.S. 684 (1975); accord, Commonwealth v. McFarlane, 252 Pa. Superior Ct. 523, 382 A.2d 465 (1977) (allocatur denied (1978)). Otherwise, the defendant may only be convicted of voluntary manslaughter. 18 Pa. C.S. §2503.

In reviewing the jury's determination in this regard, we must determine whether the clear weight of the evidence shows "that the defendant was impassioned and that a reasonable man would have acted in the heat of passion in the circumstances." Commonwealth v. Henderson, 273 Pa. Superior Ct. 51, 54, 416 A.2d 1084, 1085 (1979); accord, Commonwealth v. McCusker, 448 Pa. 382, 292 A.2d 286 (1972). The passion involved must be brought on by a sufficient provocation. Commonwealth v. McCusker, 448 Pa. at 390, 292 A.2d at 290. In this case, the defendant seems to be intimating that

his wife's extramarital activities was a sufficient provocation to bring on the heat of passion. However as Cindy Smith, a neighbor of the victim, and the defendant have both testified, the defendant was aware of his wife's infidelity for at least four months prior to the murder. This is a sufficient period for a reasonable man to have cooled off.

Also, the defendant alleges that his wife swung a hammer at him and that this was a sufficient provocation. The defendant's reaction to this alleged provocation was to hit her with a claw hammer, stab her, and strangle her. This reaction is well beyond what a "reasonably provoked" man would be expected to do. Further, the fact that the defendant was drinking the night of the murder is irrelevant in determining how a reasonable man would have acted. Commonwealth v. Henderson, 273 Pa. Superior Ct. at 54 n.*, 416 A.2d at 1085, n.*.

Under either interpretation of the alleged provocation the jury's determination is not contrary to the clear weight of the evidence.

The defendant also seems to be alleging that he did not have the specific intent to kill because he

had a diminished capacity brought on by acute alcoholism. If this is indeed what he is now alleging, then he has violated Pa. R.Crim.P. 305(c)(1)(b), which requires that the defendant give pre-trial notice of such a defense. Commonwealth v. Frisoll, 277 Pa. Superior Ct. 396, 419 A.2d 1204 (1980).

Assuming that the defendant has complied with Pa. R.Crim.P. 305, the only evidence that was presented in this defense was testimony by the defendant and his sisters that he had been hospitalized for alcoholism. The defendant would then have us assume that because he allegedly was suffering from acute alcoholism that he must therefore have a diminished capacity. Such an assumption does not necessarily follow from the fact of his hospitalization and he has presented no medical evidence to support such an inference.

In any event, even if the defendant has presented medical testimony to back up his assertion, the lay witnesses' testimony that the defendant appeared normal would be sufficient to allow the jury to reject the diminished capacity defense. Commonwealth v. Brantner 486 Pa. 518, 406 A.2d 1011 (1978)

The defendant further agrees that because he cannot remember inflicting the wounds upon the victim that he cannot have premeditated the murder. The jury as trier of the fact was free to reject the defendant's testimony about his loss of memory. Commonwealth v. Jensch, ____Pa. Superior Ct._____, 469 A.2d 632 (1983) Nonetheless, memory by the killer of his deeds is not a prerequisite to finding premeditation. Premeditation may be inferred from circumstantial evidence, like the use of a deadly weapon upon a vital part of the victim's body, Commonwealth v. Green, 493 Pa. 409, 426 A.2d 614 (1981) (paring knife); Commonwealth v. Gardner, 490 Pa. 421, 416 A.2d 1007 (1980), or evidence of strangulation. Commonwealth v. Graves, ___Pa. Superior Ct. ____, 456 A.2d 561 (1983). In this case, the defendant used two deadly weapons, a claw hammer and a wood chisel, and he also strangles his wife. The jury's inference of premeditation under these circumstances is not contrary to the weight of the evidence.

Finally, the defendant appears to argue that the fact that he was hospitalized up until hours before the murder indicates that there was insufficient time to plan or premeditate the killing. Such an argument

is a non sequiter. The period of premeditation necessary to form the requisite specific intent can be very short, and does not need to take hours to germinate. Commonwealth v. Green, 493 Pa. at , 426 A.2d at 617; Commonwealth v. Hartzell, ___Pa. Superior Ct. ____, 467 A.2d 22, 27 (1983). In this case, evidence of earlier threats to his wife as testified to by Cindy Smith, and the defendant's remarks about killing his wife that he made to David Fuller, show that the premeditation may have been occurring over a long period of time.

Having considered all the alleged errors, we find that the jury's verdict was not contrary to the clear weight of the evidence.

B. Sentencing Portion of the Trial

The defendant also alleges that the jury's determination that the defendant tortured his wife prior to her death is contrary to the clear weight of the evidence. 42 Pa. C.S. §9711 spells out the sentencing procedure to be used in a first degree murder case. If the jury finds that the enumerated aggravating circumstances outweigh the mitigating

circumstances, a sentence of death will be imposed. 42 Pa, C.S. §9711(c)(1)9iv.). In this case the jury found the presence of the aggravating circumsatnce of torture, but no mitigating circumstances.

Torture is not defined in the statute, 42 Pa. C.S. §9711(d)(8), therefore the Court must rely upon the common-place or everyday meaning of that word. The common definition of torture is the intentional inflic tion of pain and suffering on the victim prior to death. Cf., People v. Steger, 16 Cal. 3d 539, 128 Cal. Reptr. 161, 546 P. 2d 665, 83 A.L.R. 3d 1206 (1976); Annot., 83 A.L.R. 3d 1222 (1978 & Supp); Webster's Third New International Dictionary 2414 (1976).

The oral evidence presented herein showed that the victim was hammered and stabbed, and then strangled. Although, as the defednant points out, there is no evidence of how long he brutalized his wife prior to her death, it can be inferred from the amount of brutality perpetrated upon her that the victim underwent some period of pain and suffering. This inference is bolstered by the fact that the extension cord was originally upstairs, suggesting that the defendant had

to stop to go upstairs to get the cord before he could finish his deed. This suggests that the victim lied there in pain, while the defendant sought the cord to administer the final act. These factors also create the inference that the pain and suffering was intentionally inflicted.

Further, Dr. Rozwadowski, the pathologist, testified that there was some period of time between the hammering and stabbing, and the strangulation. Though he was uncertain of the time that elapsed, the jury could have inferred that the victim has undergone a period of pain and suffering and that such pain and suffering was intentionally inflicted.

As was mentioned previously, the pictures of the deceased as she looked at the scene of the crime, also helped to establish that she must have underwent pain and suffering prior to death.

Given all of these considerations, we find that the jury's determination that torture was involved, was not contrary to the clear weight of the evidence.

IX. SUFFICIENCY OF THE EVIDENCE[1]

In evaluating the sufficiency of the evidence to sustain a conviction, the well established rule is:

> The sufficiency of the evidnce must be evaluated upon the entire trial record. All the evidence must be read in the light must favorable to the Commonwealth and it is entitled to all reasonable inference arising therefrom. The effect of such a Motion (in Arrest of Judgment) is to admit all the facts which the Commonwealth's evidence tends to prove...Also, in passing upon such a Motion, all evidence actually received must be considered whether the trial rulings thereon were right or wrong.

Commonwealth v. Terenda, 433 Pa. 519, 523, 252 A.2d 635, 639 (1969); Commonwealth v. Strunge, 287 Pa. Superior Ct. 212, 216, 429 A.2d 1176, 1178 (1981); accord, Commonwealth v. Rawles, ____Pa. _____, 462 A.2d 619 (1983).

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[1]We address this issue even though it has not been argued or briefed because of the seriousness of the penalty imposed and the exacting review this case will have in the Pennsylvania Supreme Court.

We interpret defendant's allegations that this Court erred in the denial of his demurrer and that the "verdict is contrary to law" as being a motion in arrest of judgment challenging the sufficiency of the evidnce for his murder conviction.

18 Pa. C.S. §2501-2502 set out the following elements which must be proved to sustain a conviction for first degree murder: 1) a person must be killed; 2) the defendant must have killed the victim; and 3) the defendant must have the specific intent to kill. In addition, the Pennsylvania Supreme Court has read into the statute the requirement that common-law malice must also be shown. Commonwealth v. Thompson, 466 Pa. 15, 351 A.2d 280 (1976); Commonwealth v. Hare, 486 Pa. 123, 404 A.2d 388 (1979)

Merle Wood, the county coroner, identified the person killed as Sara Nelson, so the first requirement was met.

The defendant herein admitted that he killed his wife to police officers Love, Skellie and Orr, Assistant District Attorney Connelly, his girl friend, the bartender at Zurn's and a cab driver. From all this testimony,it is clear that the second element of the crime was established.

The term "specific intent to kill" is a phrase developed by our courts as another way of expressing the statutory requirement that the killing be "willful, deliberate and premeditated." Commonwealth v. O'Searo,

466 Pa. 224, 234, 352 A.2d 2d 30, 35 (1976).

Reading the evidence in the light most favorable to the Commonwealth, the specific intent to kill requirement could be inferred from the intentional use of deadly weapons (a claw hammer and a wood chisel) upon vital parts of the human body, Commonwealth v. Green, 493 Pa. 409, 426 A.2d 614 (1981) (paring knife-deadly weapon); Commonwealth v. Gardner, 490 Pa. 421, 416 A.2d 1007 (1980): or from the evidence of strangulation, Commonwealth v. Graves, ____Pa. Superior Ct. ____456 A.2d 561 (1983); or from the combination of the use of deadly weapons and strangulation. The specific intent to kill could also be inferred from the conversation that the defendant had with David Fuller wherein he asked what the penalty for murder was and confessed that he was mad at his wife. Further, Cindy Smith testified that in September, 1982, the defendant said he would kill his wife if she would not come back to him. Considering all the aforementioned evidence, the Commonwealth established the third requirement.

Malice or malice aforethought is a general intent requirement. Commonwealth v. Weinstein, 499 Pa. 106,

115,451 A.2d 1344, 1348 (1982). It can be established by showing that the killing was committed "with an intent to kill or to inflict serious bodily harm", or with reckless disregard for human life. Commonwealth v. Hare, 486 Pa. at 129, 404 A.2d at 391. Virtually the same considerations used to establish "specific intent to kill" will also establish malice. See, Commonwealth v. O'Searo, 466 Pa. 224, 352 A.2d 30 (1976); Commonwealth v. Graves, ____Pa. Superior Ct.___, 456 A.2d 561 (1983). The use of a deadly weapon O'Searo, supra, and evidence of strangulation, Graves, supra, will also allow an inference of malice. Thus the evidence established malice.

Therefore, reading all the evidence in the light most favorable to the Commonwealth, there is sufficient evidence of record to establish all the prerequisites for a verdict of first degree murder.

B. The Sentencing Phase

We also interpret the defendant's motion as challenging the sufficiency of the evidence used to prove the aggravating circumstances of torture.

As we previously mentioned, torture is not defined in the sentencing statute. 42 Pa. C.S. §9711

(d)(8). Therefore, we must rely upon the common sense definition, which defines torture as the intentional infliction of pain and suffering. Cf. People v. Steger, 16 Cal. 3d 539, 128 Cal. Rptr. 161, 546 P. 2d 665, 83 A.L.R. 3d 1206 (1976); Annot., 83 A.L.R. 3d 1222 (1978 and Suppl.); Webster's Third New International Dictionary 2414 (1976)

In looking at the evidence in the light most favorable to the Commonwealth, there are numerous grounds on which the jury could have found torture. The brutality of the killing itself, where the defendant hammered, stabbed, and strangled the victim, would be sufficient to infer that the defendant intentionally inflicted pain and suffering on the victim prior to her death. The fact that the extension cord used to strangle the defendant was originally upstairs suggests that the defendant had to stop brutalizing his wife to go upstairs to get the cord. This also would help bolster the inference that the defendant tortured his wife.

Also, Dr. Rozwadowski, the pathologist, testified that a period of time elapsed between the finish of the hammering and stabbing and the start of the

strangulation. Though he was uncertain of the time period between the two events, the jury could have inferred that the victim had undergone a period of pain and suffering, and that such pain and suffering was intentionally inflicted.

Finally, the picture of the victim with her many wounds would also help to create the inference that she was tortured prior to death.

Considering all of this evidence in the light most favorable to the Commonwealth, there is sufficient evidence of record to support the jury's determination that torture was involved.

O R D E R

ADN NOW, to-wit, this 17th day of April, 1984, after considering the motion for new trial and/or arrest of judgment by the defendant, John Andrew Nelson, the motion is hereby denied. The defendant is directed to appear for sentencing on April 24, 1984, at 8:45 A.M.

BY THE COURT

_____
J.

cc: Bradley H. Foulk, Esquire
Frank J. Scutella, Esquire

(J-148-1986)
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	NO. 43 W.D. Appeal Docket, 1984
	:	
	:	Appeal from Judgment of Sentence of Court of
vs	:	Common Pleas of Erie County, Criminal Division
	:	entered May 7, 1984 at
	:	No. 59 A & B of 1983
JOHN A. NELSON, Appellant	:	ARGUED: September 15,1986

OPINION

NIX, C. J. Filed: April 3, 1987

The Appellant, John A. Nelson, was convicted by a jury of murder in the first degree and of possession of an instrument of crime. Following further deliberation, the jury decided that imposition of the death sentence was appropriate, having found the aggravating cricumstances of torture. After denying the appellant's post-trial motions, the trial court formally imposed the judgment of sentence of death for the murder; and also sentenced him to a term of imprisonment of from one to two years for the companion crime. There followed this direct appeal to this Court

pursuant to section 722(4) of the Judicial Code, 42 Pa. C.S. §722(4).

In the early evening of February 14, 1983, John A. Nelson was released from a hospital after having spent about three days there for problems of alcoholism. Later that same night he killed his wife, Sara Nelson, which subjecting her to a sequence of brutal assaults in the basement of a certain business establishment. He struck her on the head with a claw end of a hammer; then stabbed her repeatedly in the chest with a chisel; and finally, strangled her by wrapping an electric cord around her neck. At trial the Commonwealth's medical testimony established the cause of death as being by strangulation.

The record evidence discloses that about 7:00 P.M. on the night in question, prior to the killing, appellant Nelson had gone to a local bar and engaged in conversation with one David Fuller, an ex-policeman. In that conversation, according to Fuller's testimony at trial, the appellant remarked that he was angry with hsi wife and inquired as to the penalty for murder. Fuller further testified that the appellant did not appear to be intoxicated during this conversation.

John Nelosn left the bar and went to his wife's residence where he was amditted by his stepdaughter, Ms. Dina. In the opinion of Ms. Dina, the appellant was not under the influence of alcohol when he arrived. Sara Nelson was home and did meet with her husband. About 8:00 P.M., Mrs. Nelson agreed to drive her husband to a certain beauty parlor. It was in the basement of the beauty parlor that he subjected her to the brutal, fatal attack that ended her life. Thereafter, he removed Mrs. Nelson's car to another location; and then telephoned his stepdaughter, representing that he was again looking for his wife. A short time later, however, he told at least three friends or acquaintances that he had killed his wife.(1) Around 11:00 P.M. the same night the appellant called the local police and confessed to having killed his wife. After being place in police custody, and after receiving the required Miranda warnings, he twice more stated to the police that he had killed his wife. Prior to trial the

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(1) These admissions were made to Ms. Lottie Boyles, George Shoemaker and David Zanni.

appellant filed a motion seeking to suppress his statements to the police, but that motions was denied.[2]

During trial appellant sought to convince the jury that he was so intoxicated on the night of the killing that his actions were not deliberate and premeditated and that he did not possess a specific intent to take his wife's life. In this context, he attempted to establish that he was so afflicated by the curse of chronic, severe alcoholism that his mond had become impaired to the point of being incapable of committing a premeditated homicide or of forming a specific design to kill. The only evidence adduced by the defense in support of this theory of diminished mental capacity was testimony provided by appellant himself and testimony supplied by his sisters, stressing that his hospitalization prior to the killing had been for the treatment of alcoholism. The defense did not offer expert medical testimony to establish the extent to which his alleged alcoholism had impaired

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(2) In this appeal the appellant does not challenge the suppression ruling relating to the incriminating statements made to the police.

his mental faculties. Defense counsel argued to the jury that the homicide could not rise any higher than murder in the third degree based upon the assertion of mental incapacity due to alcoholism. The Appellant also argued in the alternative that he killed his wife while in a heat of passion brought on by a marital dispute during which she struck him with a hammer.

The jury's verdict in this case makes it clear that they rejected the appellant's allegations of diminished mental capacity or conduct while in a heat of passion, and that they believed the evidence established an intentional malicious killing. In deciding that imposition of the death penalty was appropriate, the jury expressly accepted the prosecution's theory that the homicide was committed by means of torture and found that there were no outweighing mitigating circumstances.

Before this court, the appellant raises numerous challenges; some are directed at the guilt stage of his trial but most are concerned with the sentencing phase of the proceedings.

Our review of this case must start with the question of whether the record evidence was sufficient to sustain the verdict of first degree murder returned by the jury. Commonwealth v. Wallace, 500 Pa. 270, 455 A.2d 1187 (1983); Commonwealth v. Zettlemoyer, 500 Pa. 16, 26 n.3, 454 A.2d 937, 942 n.3 (1982). Section 2502(a) of the Crimes Code, 18 Pa. C.S.§2502(a), states that "(a) criminal homicide constitutes murder of the first degree when it is committed by an intentional killing" (emphasis added). The phrase "intentional killing" is defined as a "willful, deliberate and premeditated killing." 18 Pa. C.S. §2502(d). This Court has held that a "willful, deliberate and premeditated killing" is one where the actor has a specific intent to bring about the death of the victim. Commonwealth v. Meredith, 490 Pa. 303, 309, 416 A.2d 481, 484 (1980); Commonwealth v. O'Searo, 466 Pa. 224, 352 A.2d 30 (1976); Commonwealth v. Jones, 355 Pa. 522, 50 A.2d 317 (1947). The test by which we must determine the sufficiency of the evidence is whether, accepting as true all of the Commonwealth's evidence and all reasonable inferences arising therefrom upon

which, if believed, the fact-finder could reasonably have based its verdict, such evidence and inferences are sufficient in law to establish the elements of the crime in question beyond a reasonable doubt. Commonwealth v. Bradley, 481 Pa. 223, 392 A.2d 688 (1978), cert. denied 440 U.S. 938 (1979); Commonwealth v. Malone, 444 Pa. 397, 281 A.2d 866 (1971).

Under the testimony presented at trial, the Commonwealth's evidence was unusually impressive in establishing the specific intent to kill. The element of specific intent is one that may be proved from the circumstances surrounding the event. Commonwealth v. Paquette, 451 Pa. 250, 301 A.2d 837 (1973). As we noted in Commonwealth v. Meredith, supra:

> Where one does not verbalize the reasons for his actions, we are forced to look to the act itself to glean the intentions of the actor. Where the intention of the actor is obvious from the act itself, the finder of the fact is justified in assigning the intention that is suggested by the conduct. If a deadly force is knowingly applied by the actor to the person of another, the intent to take life is as evident as if the actor stated the intent to kill at the time the force was applied. (Emphasis added.)

490 Pa. at 311, 416 A.2d at 485.

Here, appellant admitted causing the death of his wife to individuals even before his arrest on these charges. Thereafter, during custodial interrogation, he again confirmed the fact that he brought about the termination of his wife's life. Thus the fact that he was the cause of the death is amply supported by the testimony presented. The circumstances surrounding the event reflect with equal clarity his intent at the time to bring about the death of his spouse. Having first assaulted his wife with a hammer and then a chisel, and being unsuccessful in extinguishing her life, appellant then left the basement, went upstairs and secured an electric cord and returned to the basement where he effectively used the cord to accomplish his purpose. From this sequence of events, the jury was certainly justified in concluding that the assault wsa designed to terminate the life of the unfortunate victim. See, e.g., Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183 (1985). We are satisfied that the evidence produced by the Commonwealth provided ample basis for the jury's determination that the killing was

willful, deliberate and premeditated.

Notwithstanding the legal sufficiency of the Commonwealth's evidence to sustain the jury's verdict of first degree murder, the appellant asserts that the verdict was against the weight of the evidence.[3] In support of that proposition he argues that, given his evidence concerning the effect of his alcoholism on his mental capacity, the jury should have found that his mind was so impaired that it could not form a specific intent to kill. It is true that in Pennsylvania diminished mental capacity may be defense to a charge requiring a specific intent. Commonwealth v. Zettlemoyer,

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(3) Unlike the challenge of legal sufficiency of the evidence, the complaint that the verdict was aginst the weight of the evidence requires an assessment of the credibility of the testimony offered by the Commonwealth. Commonwealth v. Brantner, 486 Pa., 518, 522 n.2, 406 A.2d 1011, 1013 n.2 (1979); Commonwealth v. Farquharson, 467 Pa. 50, 60, 354 A.2d 545, 550 (1976). It is a rule of this Commonwealth that an appellate tribunal should not entertain a challenge to the weight of the evidence since their examination is confined to the "cold record." Commonwealth v. Pronkoskie, 498 Pa. 245, 445 A.2d 1203 (1982); Commonwealth v. Farquharson, supra; Commonwealth v. Paquette, 451 Pa. 250, 301 A.2d 837 (1973). However, where the penalty of death is imposed we will consider such a complaint.

supra; Commonwealth v. Weinstein, 499 Pa. 106, 451 A.2d 1344 (1982); Commonwealth v. Branter, 486 Pa. 518, 406 A.2d 1011 (1979); Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914 (1976). However, the appellant's reliance upon that theory in this case is without merit. Even assuming, arguendo, that the appellant's evidence concerning his chronic alcoholism and its effect, consisting solely of testimony from him and his sisters, could have justified a finding of diminished mental capacity, the jury was not compelled to accept this testimony or to make such a finding. It is a fundamental rule of law that a jury may believe any, all or none of a party's evidence. E.g., Commonwealth v. Stoyko, 504 Pa., 455, 475 A.2d 714 (1984) Even has the appellant presented expert medical testimony to establish that his mental capacity had been diminished by chronic alcoholism and that the infirmity affected his actions at the time of the killing, the jury would not have been obliged to accept such testimony. Commonwealth v. Walzack, supra.

As a further argument that the verdict was against the weight of the evidence, the appellant asserts that the testimony indicated he killed his wife in a

"heat of passion" brought on by a marital dispute, and that with such evidence the jury could have returned a verdict of voluntary manslaughter. It is true that extended provocation brought about by stress, anger and hostility caused by marital problems can provide grounds for a verdict of voluntary manslaughter instead of murder. Commonwealth v. Shaver, 501 Pa. 167, 460 A.2d 742 (1983). However, in the instant case the "heat of passion" defense rested upon the jury's acceptance of appellant's trial version of the events. The weight and credibility of that testimony was for the trier of fact to determine. Id.; Commonwealth v. Farquharson, 467 Pa. 50, 354 A.2d 545 (1976). And, as previously noted, it was within the province of the fact-finder to believe all, some or none of the appellant's testimony. Commonwealth v. Stoyko, supra.; Commonwealth v. Shaver, supra.

The appellant's arguments concerning the weight of the evidence were, of course, first raised before the trial court in his post-trial motions, and were rejected by the trial judge. The trial judge was able to observe the demeanor of the witnesses as they offered their

evidence and was satisfied that the jury's verdict was justified. A jury's resolution of the facts should not be disturbed unless the failure to do so would be tantamount to a miscarriage of justice. See, e.g. Bohner v. Eastern Express, Inc. 405 Pa. 463, 175 A. 2d 864 (1961); Lupi v. Keenan, 396 Pa. 6, 151 A.2d 447 (1959); Frank v. W.S. Losier & Co. Inc. 361 Pa. 272, 64 A.2d 829 (1949). Such would be the case where the quality and/or quantity of the evidence clearly does not support the verdict reached. See Commonwealth v. Vogel, 458 Pa. 200, 321 A.2d 633 (1974). Clearly such a situation is not presented in this appeal.

The appellant next raises as a ground for a new trial the fact that the trial judge, at the beginning of the defense's case during the guilt stage of the proceedings, refused to grant the motion of defense counsel for a recess prior to calling the appellant to the witness stand. The motion was made about 4:00 P.M. on a Monday, in the midst of trial, and sought to have the proceedings adjourned until the following morning, purportedly to give defense counsel additional time to determine whether or not his client

would testify. We note that defense counsel had assumed the representation of his client long in advance of trial; we also note that counsel had advised his client relating to hsi right to testify on his own behalf, and further stated that he had advised his client that, in counsel's judgment, he should, in this case, testify. Moreover, counsel and his client had the entire weekend prior to the Monday in question to further consider whether the client would testify. In denying the motion for the 4:00 P.M. adjournment, the trial judge took the position that the time had come for the defense to make its final decision as to whether the appellant was going to testify. When the appellant took the witness stand after the adverse ruling, he was questioned on direct examination solely about matters of his personal background and events prior to the killing. That part of his testimony was concluded about 4:35 P.M., at which point court was adjourned for the day. Thus the effect of the refusal to grant the requested adjournment merely forced the defense to make the decision it had been considering for an extended period

prior to that moment.

Contending here that the denial of the recess was a violation of his right to confer with counsel as guaranteed by the Sixth Amendment of the Federal Constitution, the appellant relies on the decision of the United States Supreme Court in Geders v. United States, 425 U.S. 80 (1976). That case, however, does not support the appellant's contention. Geders upheld the right of a criminal defendant to confer with his counsel during a recess which had been called by the trial judge; the case does not address the question of the defendant's right to have a recess called. It is within the sound discretion of the trial judge to control the course of trial. Commonwealth v. Dress, 354 Pa. 411, 47 A.2d 197 (1946). There was no question in the instant case that the defense had ample opportunity to explore their options and that they were not forced to make a hasty decision. Moreover, the appellant has not suggested how the denial of the recess prejudiced him. It is therefore apparent that this assignment of error is totally without merit.

It also follows that the appellant's related contention, that trial counsel was ineffective in not including the recess denial as a ground in his post-trial motions, must fail as well. Counsel is not ineffective for failing to assert a baseless claim. Commonwealth v. Williams, 500 Pa. 226, 455 A.2d 632 (1983); Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977).

The appellant next complains that his trial attorney was ineffective in failing to comply with Pa.R.Crim.P. 305(c)(1)(b), which requires the defense to give the Commonwealth pre-trial notice of an intention to offer at trial a claim of mental infirmity. This argument must also be rejected as a ground for a new trial. Despite the apparent failure of defense counsel to comply with the above procedural requirement, the trial court permitted the defense to claim diminished mental capacity, to present evidence in support of the claim, and to argue the matter to the jury for their consideration. Therefore, we cannot ascertain how, if at all, the Appellant was actually prejudiced by the procedural

omission; his brief to this Court provides us with no hlep in that regard. Before a defendant on direct appeal is entitled to further inquiry under a theory of ineffective assistance of trial counsel, it must appear that counsel's omission or improper commission was, in some way, prejudicial to the interests of the defendant. Commonwealth v. Ford, 491 Pa. 586, 421 A.2d 1040 (1980); Commonwealth v. Wade, 480 Pa. 160, 389 A.2d 560 (1978).

Still maintaing that he was not effectively represented during the guilt stage, the appellant further avers that trial counsel failed to seek pre-trial discovery from the Commonwealth. In support of this argument the appellant's brief simply states that : "it is alleged and believed that the Commonwealth was in possession of substantial medical evidence which would relate to the defendant's mental or physical condition." (Emphasis added.) Upon the record before us in this appeal there is no way of knowing whether trial counsel did or did not attempt to secure such pre-trial discovery; nor is there any way of knowing from the appellant's brief what, if

any, medical evidence the Commonwealth may have have had in its possession. In providing this Court with nothing more than a bare allegation or statement of belief to support the argument, the appellant would have us consider a claim in the abstract. That we will not do. Commonwealth v. Floyd, 506 Pa. 85, 484 A.2d 365 (1984).

The appellant also complains that his defense counsel made no attempt, during the guilt phase of the trial, to present any expert medical testimony concerning the impact of his alcoholism on his mental capacity. However, the appellant makes no assertion here that there was a medical witness who would have offered testimony favorable to his defense of diminished mental capacity. Consequently, this assertion of ineffective assistance of counsel is also without merit. Commonwealth v. Floyd, supra. As a final challenge to the effectiveness of counsel's assistance during the guilt stage, the appellant contends that counsel's closing argument fell short of required standards. Our review of counsel's efforts in that regard discloses no such failure.

Having concluded that the Commonwealth's evidence in this case was legally sufficient to sustain the jury's verdict of first degree murder, and having rejected the arguments upon which the appellant relied for the grant of a new trial, we turn now to the appellant's assertions regarding the sentencing phase of the proceedings against him.

In urging us to vacate the sentence of death, the appellant first directs our attention to the torture element of the case. He asserts that section 9711 (d)(8) of the Sentencing Code, 42 Pa. C.S. §9711(d)(8), which makes torture an aggravating circumstance upon which a sentence of death can be based, is unconstitutionally vague. He further asserts that the trial judge's charge to the jury concerning torture was prejudicially inadequate; and that the Commonwealth's evidence was not legally sufficient to prove that the killing of Mrs. Nelson was accompanied by torture. The appellant also complains that his trial counsel was ineffective in not demurring to the Commonwealth's proof of torture as an aggravating circumstance, and for not objecting to the trial judge's charge relating to torture.

Ordinarily the failure of trial counsel to timely raise these objections would constitute a waiver and therefore preclude a consideration of these issues on the merits. E.g., Commonwealth v. Clair, 458 Pa. 418, 326 A. 272 (1974). It would then be incumbent upon appellant to show that those omissions constituted ineffective assistance of counsel. Commonwealth v. McNeil, 506 Pa. 607, 487 A.2d 802 (1985); Commonwealth v. Miller, 494 Pa. 229, 431 A.2d 233 (1981); Commonwealth v. Gay, 489 Pa. 17, 413 A.2d 675 (1980). However, in capital cases we have relaxed the traditional waiver concepts because of the uniqueness of the penalty involved, and permit an assessment of the alleged error on its merits. See, e.g. Commonwealth v. Pirela, 510 Pa. 43, 507 A.2d 23 (1986); Commonwealth v. Pursell, supra; Commonwealth v. Stoyko, supra; Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700, cert. denied, 469 U.S. 963 (1984); Commonwealth v. Zettlemoyer, supra; Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). Moreover, in this instance such an inquiry is facilitated since the issues raised do not depend

upon facts which were not part of the record.[4]

Section 9711(d) of the Sentencing Code enumerates ten categories[5] of circumstances which are characterized as aggravating and hence warrant imposition of the death penalty for first-degree murder. In this case the Commonwealth relied solely on subsection 8 for the aggravating circumsatnce to justify the penalty of death. That subsection provides that the death penalty may be appropriate where "(t)he offense was committed by means of torture." The record of the sentencing proceeding reflects that the court's entire instruction relating to this aggravating circumstances was as follows:

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(4) Frequently, in the context of complaints of ineffectiveness of counsel, an evidentiary hearing is required to establish the factual predicate upon which the legal issues will depend. Here, it is a pure question of law which eliminates a necessity for remand for a further hearing.

(5) As a result of an amendment by Act 1986-87, signed July 7, 1986, section 9711(d) was increased by two additional aggravating circumstances. However, as noted in the text of this opinion, there were only ten enumerated categories at the time of trial.

> Now, the Crimes Code (sic) defines aggravating circumstances. For purposes of this particular case only the following matters, if proven, can constitute aggravating circumstances, and in this case there is only one item in which the Commonwealth is contending under the Crimes Code (sic) that there is an aggravating circumstance, and that is that the offense was committed by means of torture.
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> T.T. Vol. V. pp. 198-199.

Appellant notes that the word "torture", as used in subsection 8, is given no definition by the Sentencing Code and that the trial court made no effort to further define that term for the jury in this case. He argues that this was an insufficient instruction that constituted a denial of due process.

A well recognized aspect of the void-for-vagueness concept is the requirement that standards be sufficiently precise to guide the court and jury. Godfrey v. Georgia, 446 U.S. 420, 428, 29 (1980) (opinion of Stewart, J. announcing judgment of the Court, joined in by Blackmun, Powell and Stevens, JJ.) Proffitt v. Florida, 428 U.S. 242, 255-56 (1976) (opinion by Powell, J., announcing judgment of the Court, joined in by Stewart and Stevens, JJ.); Gregg

v. Georgia, 428 U.S. 153, 192-94 (1976)(opinion of Stewart, J. announcing judgment of the Court, joined in by Powell and Stevens, JJ.). In this instance the question is whether by merely utilizing the word "torture", the General Assembly has made sufficiently clear the requisite degree of culpability for the imposition of the death penalty under this particular aggravating circumstance.

The test to be applied is whether the prohibited conduct is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. See, generally Note, The Void-For-Vagueness Problem in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). The word torture is defined in Webster's Third New International Dictionary (unabridged) as "the infliction of intense pain (as from burning, crushing, wounding) to punish or coerce someone; torment or agony..., anguish of body or mind; excruciating agony..." As noted by this Court in Commonwealth v. Pursell, supra, 508 Pa. at 238, 495 A.2d at 196, the general "meaning of such a term (torture) is a matter of common knowledge,..." The word torture is generally understood as "the infliction of a

considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel manifesting exceptional depravity." Id. at 239, 495 A.2d at 196. Thus we agree with the Commonwealth that the word "torture", even with its ductile quality, does not present a vagueness question of constitutional proportions. Commonwealth v. Pursell, supra. Thus we reject the contention that subsection 8 is unconstitutionally vague because of its use of the word "torture" without further elaboration of that term.

However, this conclusion does not end our inquiry into the instant complaints. It is the responsibility of the courts to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, supra, at 428.[6]

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(6) Arbitrary and capricious sentencing can only be avoided where the issues are clearly identified and the controlling law explained. E.g. Godfrey v. Georgia, 446 U.S. 420 (1980). The function of elucidating the relevant legal principals belongs to the trial judge, and the failure to perform this function deprives the defendant of a fair trial. Commonwealth v. Bishop, 472 Pa. 485, 372 A.2d 794 (1977).

The sentencing phase under seciton 9711 is only applicable after there has been a finding of murder in the first degree. The aggravating circumstance provide an additional element to the intentional killing which justifies the ultimate sentence. Thus subsection 8 of section 9711 must of necessity require more than a mere intent to kill.[7] Implicit in subsection 8 is the requirement of an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killer is not satisfied with the killing alone.

The cricical distinction between Commonwealth v. Pursell, supra, and the case at bar is that in Pursell, the trial judge gave the jury a charge which contained a sufficiently guiding definition of the word "torture".

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(7) The law has long recognized the distinction between the intent to inflict pain and the intent to kill. In those cases where death resulted from the infliction of torture, legislatures deemed it appropriate to equate it with the specific intent to kill. E.g. State v. Morales, 120 Ariz. 517, 587, P. 2d 236 (1978); People v. Steger, 16 Cal. 3d 539, 546 P.2d 665 (1976); Townsend v. People, 107 Colo. 258, 111 P.2d 236 (1941); State v. McKenzie, 186 Mont. 481, 608 P.2d 428 (1980); State v. Bentford, 39 N.M. 293, 46 P.2d 658 (1935). Here where the infliction of torture is beign utilized as an aggravating circumstance after a finding of a specific intent to kill, the additional element of the intent to inflict torture provides the heinousness necessary to warrant the extreme penalty.

That charge conveyed to the jurors the idea that the "torture murderer", besides having an intent to kill, has an additional specific intent --"'an intention to inflict pain, suffering or both pain and suffering.'" 508 Pa. at 239 n. 13, 495 A.2d at 197 n.13 (quoting charge of trial judge). The central element in our decision in Pursell, is that we upheld the charge given by the trial judge regarding the meaning of "torture." Although we recognize the definitional problem that confronted the trial court in the instant case, we must also observe that the trial judge in Pursell, was faced with the same problem and yet succeeded in providing a charge which satisfied due process requirements.

Having concluded that the jury charge given during the sentencing phase of the instant case was prejudicially deficient, we must also conclude that trial counsel was ineffective in his assistance when he failed to make a timely objection to that charge.

For the reasons set forth herein, we are constrained to vacate the death sentence imposed upon the appellant, and remand the case to the court below

for the imposition of a life sentence.[8]

Mr. Justice Larsen files a concurring and dissenting opinion.

Mr. Justice McDermott files a concurring and dissenting opinion in which Mr. Justice Papadakos joins.

Mr. Justice Papadakos files a concurring and dissenting opinion in which Mr. Justice McDermott joins.

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(8) As noted previously, the appellant has raised numerous objections with respect to the sentencing phase of his trial. In view of our disposition of this appeal it is unnecessary to address his remaining arguments.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	NO. 43 W.D. Appeal Docket 1984
	:	Appeal from Judgment of Sentence of Court of Common Pleas of Erie County, Criminal Division entered May 7, 1984 at No. 559 A&B of 1983
v.	:	
JOHN A. NELSON, Appellant	:	ARGUED: September 15, 1986

CONCURRING AND DISSENTING OPINION

JUSTICE ROLF LARSEN Filed: April 3, 1987

I dissent to the vacation of appellant's judgment of sentence of death and imposition of a life sentence; I join that portion of the majority opinion affirming appellant's convictions.

By anybody's definition, appellant tortured his victim, and committed the offense of murder of the first degree by means of torture. As Justice Papadakos observes, we gave body to the meaning of the word "torture", and approved the trial court's eleboration of that term, in Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183 (1985), wherein we held that what is intended

to be included are those murders of the first degree where the actual commission of the offense included such concurrent heinous, atrocious or especially cruel acts as to set the murder apart from those murders of teh first degree not attended by aggravating circumstances, i.e., the "conscienceless or pitiless crime" which causes inordinate or extreme pain and suffering, from which the intent to cause such pain and suffering can be presumed. Id. at 239, 495 A.2d at 197.

While I believe it would be preferable to charge the jury more fully regarding the aggravating circumstances of "committed by means of torture" along the lines adopted and approved in Pursell, I do not believe that the failure of the trial court to give the more comprehensive instruction is an absolute necessity in all cases, nor do I believe that the minimal instruction on "torture" in the instant case requires that we vacate the sentence of death.

Our standard of review of a sentence of death is established by the Sentencing Code which provides that we shall affirm the sentence of death (assuming the

absence of trial errors) unless we determine that:

> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
>
> (ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or
>
> (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

42 Pa. C.S.A. §9711(h) (emphasis added).

I do not find that the sentence of death was the product of passion, prejudice or any other arbitrary factor, and it is not excessive or disproportionate to the penalty imposed in similar cases involving torture of the victim. The record also discloses sufficient evidence to support the finding of an aggravating circumstance specified in subsection (d), namely subsection (d)(8) as that subsection has been interpreted by this Court in Pursell. As Justice Papadakos states, "Appellant inflicted a considerable amount of pain and suffering on his victim", by acts that were especially "heinous, atrocious or cruel, manifesting exceptional depravity, and the acts themselves prove that Appellant

intended to torture his victim to death." Concurring and Dissenting slip op. at 3. Accordingly, we are directed by statute to affirm the sentence of death in this case.

Perhaps in the abstract, or in another case, the evidence would not support the aggravating circumstance of "torture" where the trial court gave no elaboration on the meaning of that term to the jury and the jury was permitted to find such aggravating circumstances on sparse or speculative evidence of "torture." This is not such a case, however. It is a case where the jury could have, and did, apply its common understanding of the word "torture" to the heinous facts before it to arrive at a fully supported determination that the offense had been committed by means of torture.

As the United States Supreme Court has stated in a related context, it "is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences." Barclay v. Florida, 463 U.S. 939, 950 (1983). If a court failed to instruct a jury on the legal meaning of negligence in a civil case, and the jury found a defendant negligent who had driven his

car at 100 m.p.h. through a crowded pedestrian crossing against a red light, I do not believe we would require a new trial simply because the jury instruction regarding "negligence" was at its "bare bones minimum." We could legitimately review the record and find any inadequacy in the instruction to be harmless. So too in the instant case, where the jury correctly applied its common understanding of the word "torture" and found the existence of that aggravating circumstance (§9711(d)(8)), and where the record demonstrates sufficient evidence to support that aggravating circumstance as interpreted in Pursell.

Alternatively, as I must be bound by the majority's position regarding the adequacy of the court's instruction on the aggravating circumstance, I would not remand for imposition of a life sentence. Rather, I would vacate the sentence of death and remand for a new sentencing proceeding, for the reasons set forth in my concurring and dissenting opinion in Commonwealth v. Williams, ___Pa.____, ____A.2d____(1987) (J-149-1986, filed March 17, 1987).

(J-148-86)
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA Appellee	:	NO. 43 W.D. Appeal Dkt. 1984
	:	Appeal from Judgment of Sentence of Court of Common Pleas of Erie
vs	:	County, Criminal Division entered May 7, 1984 at No. 559 A & B of 1983
JOHN A. NELSON, Appellant	:	ARGUED: September 15,1986

CONCURRING AND DISSENTING OPINION

MR. JUSTICE McDERMOTT FILED: APRIL 3, 1987

I join in the affirmance of appellant's conviction. However, I must dissent from the decision to vacate the sentence of death.

To kill by "means of torture", 42 Pa. C.S. §9711 (d)(8), does not mean that one must intend to kill only by torture. What is proscribed is an intentional killing that is inflicted by means of intense pain, "the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel manifesting exceptional depravity."

Commonwealth v. Pursell, 508 Pa. 212, 238, 495 A.2d 183, 196 (emphasis added). A killing by "means of torture" does not require that troture be the reason for the employment of painful means. The means of killing are evidence of intention that when proved are subsumed by the intention to kill, and where that intention is maniefsted by the unnecessary infliction of pain the torture prosecribed by the statute may be considered in imposing sanction.

What is proscribed is the infliction of pain that accompanies the intention to kill. It cannot matter to the victim that his killer is an (sic) bungler, unfamiliar with the state of the art, or did his best with the means at hand. If the means employed inflict pain as defined in Pursell, supra., the killer ought not be heard to say that the pain was a mere by-product of his killing.

MR. JUSTICE PAPADAKOS joins in this Concurring and Dissenting Opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	NO. 43 W.D. Appeal Docket 1984
	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Erie County
vs.	:	Criminal Division, entered at No. 559 A & B of 1983, on May 7, 1984.
JOHN A. NELSON, Appellant	:	Argued: September 15, 1986

CONCURRING AND DISSENTING OPINION

MR. JUSTICE PAPADAKOS FILED: APRIL 3, 1987

I join that portion of the majority opinion which affirms Appellant's conviction of murder of the first degree, but must dissent from the vacation of the sentence of death and imposition of a life sentence in this case.

We have already found that the application of our Death Penalty Statute's aggravating circumstance eight (42 Pa.C.S. §9711(d)(8)), "the offense was committed by means of torture", by a jury in its determination of whether a convicted murderer should receive the penalty

of life or death is not dependent upon the recitation of any particular formula or the incantation of specific magic words, because, in our view, we feel the meaning of such a term is a matter of common knowledge so that an ordinary man would not have to guess at what was intended. Commonwealth v. Pursell, 508 Pa. 212 at 238, 495 A.2d 183 at 196 (1985).

We also indicated that if a jury concluded that the means of torture are present "we can believe, without a reasonable doubt, that the user of such means intended to torture his or her victim to death." Pursell, at 239 495 A.2d at 197. The majority's present attempt to discredit the trial court's charge at the sentencing hearing because it did not point out that a specific intent to cause pain and suffering was necessary or that the death had to be caused by acts separate and distinct from the torture." (slip opinion p. 17), in reality, only seeks to undermine Pursell's teachings and the more basic assumption that underlies Pursell, i.e., that the term is a matter of common knowledge.

The court's charge clearly set out the statutory language and that the jury had to find that the Commonwealth's evidence on the subject was credible

beyond a reasonable doubt. The statutory language itself, "the offense was committed by means of torture", simply and sufficiently conveys to the ordinary man that the killing had to be caused by torturous methods. Not to repeat this information by any other formula as suggested by the majority, is not fatal to the charge, it only represents non-redundancy.

Apparently, the majority feels that such repetition is mandated by virtue of the facts which led to the untimely death of Appellant's victim. As I read the majority opinion, it would have us believe that the brutal assault on Appellant's wife with the claw hammer, stabs by a chisel, and choking with an extension cord, were separate, distinct episodes unrelated in time or purpose. This is illogical.

In Pursell, we found that torture was more than present, inferred same by the number of blows, manual strangulation, asphyxiation and continued traumatization of the body after death, which acts were held to be part if the same act of killing.

Here, Appellant dragged his wife into the basement of a beauty salon, assaulted her with a hammer and chisel, and when that didn't finish off her life, went

upstairs and secured an electric cord and returned to the basement where he effectively used the cord to accomplish his purpose, her death by means of torture.

I believe that a common understanding of this sequence of events would indicate that Appellant inflicted a considerable amount of pain and suffering on his victim, which was unnecessarily heinous, atrocious or cruel, manifesting exceptional depravity, and that the acts themselves prove that Appellant intended to torture his victim to death.

I would conclude that the record contains substantial evidence to support the jury's finding of aggravating circumstance 8 and that, in light of Pursell, the subsection is constitutionally valid and that the charge was sufficient for the jury to understand the law on this issue.

I therefore, join the Concurring and Dissenting Opinion authored by Justice McDermott.

Accordingly, I would affirm the conviction of murder of the first degree and affirm the sentence of death.

MR. JUSTICE McDERMOTT joins this Concurring and Dissenting Opinion.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA Appellee	:	NO. 43 W.D. Appeal Docket 1984
	:	Appeal from Judgment of Sentence of Court of Common Pleas of Erie County, Criminal Division, entered May 7, 1984 at No. 559 A & B of 1983
v.	:	
JOHN A. NELSON, Appellant	:	ARGUED: September 15, 1986

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the COURT OF COMMON PLEAS of ERIE COUNTY, be, and the same is, hereby vacated and case remanded for imposition of Life Sentence.

Irma T. Gardner
Deputy Prothonotary

Dated: April 3, 1987

June 26, 1987

Michael J. Veshecco
Frank J. Scutella, Esquire
Office of District Attorney
Court House
Erie, Pa. 16501

In Re: Commonwealth v. John A. Nelson
No. 43 W.D. Appeal Docket 1984

Gentlemen:

The Court has entered the following Order on your Petition for Reargument in the above-captioned matter:

"PER CURIAM
AND NOW, this 23rd day of June, 1987, the Petition for Reargument is denied."

Very truly yours,

Deputy Prothonotary

ITG:cho
cc: Dennis V. Williams, Esq.
Hon. LeRoy Zimmerman, Attorney General
Hon. Fred P. Anthony

THE COURT: Members of the jury, you must now decide whether or not this defendant is to be sentenced to death or to life imprisonment. The sentence will depend upon your findings concerning the aggravating and the mitigating circumstances.

The Crimes Code provides that the verdict must be a sentence of death if the jury should unanimously find at least one aggravating circumstance and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence to life imprisonment in all other cases.

Now the Crimes Code defines aggravating circumstances. For purposes of this particular case only the following matters, if proven, can constitute aggravating circumstances, and in this case there is only one item in which the Commonwealth is contending under the Crimes Code, that there is an aggravating circumstance, and that is that the offense was committed by means of torture.

Now for purposes of this case, the following matters, if proven, can constitute mitigating circumstances: That the defendant has no no significant history of prior criminal convictions: the defendant was under the influence of extreme mental or emotional disturbance: or any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense.

Now, the Commonwealth has the burden of proving aggravating circumstance beyond a reasonable doubt. I have already defined that term reasonable doubt, for you earlier in the trial. The defendant has the burden of proving mitigating circumstances but by what we call a fair preponderence of the evidence. That is a lesser burden of proof than beyond a reasonable doubt. A preponderence of the evidence exists where one side is more believable than the other side.

Now, all of the evidence from both sides, including the evidence that you heard earlier during the trial of this case, as to aggravating or mitigating circumstances is important and proper for you to consider. You should not decide out of any feelings of

vengence or prejudice towards the defendant. As I previously told you, too, you must understand that it is entirely up to a defendant whether or not to testify or to present evidence. You must not draw any adverse inference form his silence or the evidence that was presented by him. There are photographs that we have permitted to be introduced in this case, and the photographs are somewhat inflammatory in nature. You should not let them stir up your emotions. The photographs are there for one purpose only, and that is to help you in weighing the evidence as presented by the Commonwealth in terms of their contention that they have presented to you an aggravating circumstance of torture. Set aside any kind of emotion that might result from the seeing of those photographs and look only at the question of whether or not the photographs substantiate in any degree the Commonwealth's proof of torture.

Now, the verdict is for you, members of the jury. Remember and consider all of the evidence that's been presented, giving it whatever weight you think it is entitled. Now, remember, you are not merely

recommending the punishment in this case; what you are doing is actually fixing the punishment of either death or life imprisonment. Your verdict must be unanimous; it cannot be reached by a majority vote or by any percentage. It has to be the verdict of each and every one of you. Now, remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

Now, you will take with you a verdict slip, which I have here in my hand, upon which to record your verdict and findings. You will note that in the first section it says, we the jury unanimously sentence the defendant--and there are two blocks under that, two blank spaces, one along side the word death, and the other along side the words life imprisonment. It is therein that the foreman must indicate and check either your verdict of death or life imprisonment, whatever unanimous sentence it is, and then, if, in fact, the sentence should be one of death,

you must move on to the second section of the sentencing verdict slip which says, we the jury have found unanimously--and therein there are two sections you must deal with, the first of which says at least one aggravating circumstance and no mitigating circumstance, the aggravating circumstance is--therein there is a blank line, and if that's your finding, you should check that line, to begin with, and then indicate the aggravating circumstance and, of course, in this case there is only one aggravating circumstance the Commonwealth is contending, and that is the offense was committed by means of torture. The second block deals with a statement of one or more aggravating circumstances which outweigh any mitigating circumstances and the aggravating circumstance is--and again, if that's the finding of the unanimous jury, you must 'x" that block and indicate there what the aggravating circumstance is. On the bottom line, there is a line for the foreman to sign, on the left-hand side, there is a blank space for the date.

Members of the jury, at this point, you will leave with the tipstaffs and take with you

the sentencing slip and proceed to deliberate the sentence to be imposed in this case or either death or life imprisonment.

Are there any corrections or additions to the Court's instructions before the jury begins their deliberations?

MR. FOULK: None, Your Honor.

MR. SCUTELLA: None, Your Honor.

THE COURT: All right. The exhibits that are going with the jury?

§9711 Sentencing Procedure for murder of the first degree

(a) Procedure in jury trials

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsection (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a senetnce shall not impeach or in any way

affect the guilty verdict previously recorded.

(b) Procedure in non-jury trials and guilty pleas

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating cricumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, dis charge the jury if it is of the opinion that further deliberations will not result in an unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury on any other matter that may be just and proper under the circumstances.

(d) Aggravating circumstances - Aggravating circumstances shall be limited to the following:

(1) The victim was a fireman, peace officer or public servant concerned in official detention, as defined in 18 Pa. C.S. §5121 (relating to escape), who was killed in the performance of his duties.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransome or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of

the commission of the offense.

(e) Mitigating circumstances - Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa. C.S.§309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(f) Sentencing verdict by the jury -

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

(2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

(g) Recording sentencing verdict - Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

(h) Review of death sentence -

(1) A sentence of death shall be subject to

automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(i) Record of death sentence to Governor - Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to

the Governor a full and complete record of the trial, sentencing hearing, imposition of sentence and review by the Supreme Court.

87 467

Supreme Court, U.S.
FILED
OCT 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO.

In The
Supreme Court of the United States
August, 1987

COMMONWEALTH OF PENNSYLVANIA
Petitioner

vs

JOHN NELSON,
Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF PENNSYLVANIA

Dennis V. Williams
Counsel of Record for the Respondent
332 East Sixth Street
Erie, Pennsylvania 16507
(814) 452-2209

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42 Pa. C.S.A. §9711(h)(3)

42 Pa. C.S.A. §9711(h)(3)(i)

F.R.C.P. S. Ct. Rule 17

STATEMENT OF THE CASE

The respondent was convicted by an Erie County jury of first degree murder for the homicide of his estranged wife. Thereafter, a sentencing hearing was held during which the Commonwealth presented evidence of aggravation as required by 42 Pa. C.S.A. §9711 et. seq. specifically the Commonwealth attempted to show that the killing was perpetrated by means of torture, 42 Pa. C.S.A. §9711(d)(8). Thereafter, the Court charged the jury during which the Trial Judge discussed the relevant law. However, the Judge failed to define for the jury the aggravating circumstance of torture.

This failure by the Court was preserved in the Lower Court and then argued before the Pennsylvania Supreme

Court. And, then, on April 3, 1987, the Pennsylvania Supreme Court filed an opinion and order in which the judgement of death was vacated and the case remanded for imposition of a life sentence. The Court cited as the reason for this decision that the Trial Court's failure to define the aggravating circumstance of torture resulted in an insufficient charge and created a possible arbitrary application.

Reargument was denied per curiam by the Court. The Petition for Writ of Certiorari from that denial followed.

SUMMARY OF ARGUMENT

The argument in support of the Petition for Certiorari is without arguable merit, and fails to include any supporting authority. Rather, the petitioner creates imaginative questions for this Court's consideration; however, even in the petitioner's world of fantasy they are not legitimate issues for review.

The Pennsylvania Supreme Court examined one of Pennsylvania's statutes and determined that such statute was not vague; however, did decide that at least one word therein (torture) should have been defined. And, that the Court's failure to do so required that the sentence of death be vacated. Such action by the Court is appropriate review for a State Court and the

decision is not of Constitutional magnitude.

Further, the vacating of the sentence of death, although admittedly unsettling to the victim's family is not State action which would raise to discrimination against those survivors, nor could such action be considered a denial of equal protection of the laws.

The defendant and the survivors are not equally situated. And, even if they were, the act of a State Court in defining a word that spares a person's life as he sets on death row is most assuredly granting an equal right to those survivors should they ever be in a similar situation as the respondent.

The petitioner request must be denied.

ARGUMENT

The Federal Rules of Criminal Procedure, specifically Supreme Court Rule 17 (considerations governing review of Certiorari), provide as follows:

> Rule 17. Considerations governing review on certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial

proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court, or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the (sic) the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

It is the position of the respondent that the instant matter is not a proper subject for review by this Honorable Court, because the questions presented do not fall within any of the enumerated reasons appearing in Rule 17 set forth entirely above. Pennsylvania's Supreme Court's decision to require definitional specificity is not within the parameters for certiorari. However, the petitioner has attempted to create a right of review by setting forth that the Pennsylvania Supreme Court's action in vacating the death penalty returned against the respondent violated the due process rights of the victim's survivors, and discriminated against them as well by allowing the respondent to live. And, even though there is an obvious absence

of supportive authority in the petitioner's argument, he/they still propose the following: when the Pennsylvania Supreme Court determined that the word torture, in its statute which allows the imposition of the death penalty, must be defined by the trial judge to insure that the death penalty is not arbitrarily imposed, it made an error of Constitutional magnitude. And, when the respondent's life was spared and when he was remanded for resentencing to life imprisonment, that the survivors were denied due process of the laws as well as the equal protection of the laws.

Such fantasy is beyond the enumerations of Rule 17 and must be outside the purview of this Court.

Pennsylvania's highest appellate Court examined a Pennsylvania statute, determined that, although not arbitrary, it was necessary to provide a consistent definition, for a word contained therein (torture), and to insure that such definition was provided to the trier of fact to prevent arbitrary application. Such state action is not a treatment of a Federal question, nor does it create a special important reason requiring certiorari. Rather, such action is the type of review that this Honorable Court has directed that states conduct when deciding Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980), wherein it was stated:

> It is the responsibility of the Courts to channel the sentencers discretion by clear objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing the death sentence.

Irrespective of Godfrey v. Georgia, supra., and in an attempt to support their immaginative theory, it appears the petitioner, in pages 7-13 of the petition for certiorari, is addressing the first question presented; however, the argument drifts from the question and towards the Court's action of requiring a definition of torture. The petitioner argues that Pennsylvania's death statute is not arbitrary, and therefore, a definition of its terms is unconstitutional, or that a definition of torture cannot be required because to

hold otherwise would conflict with the holding in Pursell, supra; and therefore, to require one is again an act of Constitutional magnitude. Neither position is of arguable merit, and therefore, the reason for the absence of any supportive authority. Thus their arguments must fail. Furthermore, they must fail because the petitioner misunderstands the requirements in Godfrey v. Georgia, Supra, and because the petitioner mistates the holding in Pursell 495, A.2d 183 (Pa. 1985). As shown hereinafter, this Court directs definitional clarity of State statutes by its Courts, and the Pennsylvania Supreme Court did require a definition in Pursell, supra., and did define it. The Court stated:

> "The word torture is generally understood as the infliction of a considerate amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel, manifesting exceptional depravity."

Additionally, the Pennsylvania Supreme Court in Commonwealth v. Nelson, 523 A.2d 728 did not vary from its holding in Commonwealth v. Pursell, Supra, at 196, but rather distinguished it by saying:

> "The critical distinction between Pursell and the case at bar is that in Pursell the Trial Judge gave the jury a charge which contained a sufficiently guiding definition of the word torture..." The central element in our decision in Pursell is that we upheld the charge given by the Trial Judge regarding the meaning of torture."

The Court in Pursell, supra. never said torture should not be defined, but

rather that it is not so vague as to reach constitutional proportions. The Court said: "We agree that the word 'torture' even with its ductile quality does not present a vagueness question of constitutional proportions," Pursell, supra., at 196, and Nelson, supra. at 737.

Therefore, for the reasons set forth above, the Pennsylvania Supreme Court's decision to vacate the respondent's death sentence because the Trial Judge failed to define torture is properly within the purview of the State Courts and not a subject for this Honorable Court's review.

The Commonwealth/petitioner, surely recognizing the weakness in its initial argument, shifts the focus from the merits of the case, the failure of the

trial court to define the word torture, and towards the survivors of the crime victims. The petitioner asserting that the legislature, in passing this legislation which provides for remand for the imposition of a life sentence when the death penalty is vacated rather than remand for a subsequent sentencing hearing, committed an error of Constitutional magnitude because the survivors of the crime victims are being denied due process of the laws and denied equal protection of those same laws. However, the Commonwealth/ petitioner feels that the only way to rectify this is to reverse the Pennsylvania Supreme Court and to reinstate the death sentence, or to remand for a second sentencing hearing

rather than to strike the law as being unconstitutional.

Such an argument is not founded in reason nor is it supported by case law. You cannot equate due process between defendants and crime victims survivors. They are by no means similarly situated. However, each class has the same interest, that being to insure that the statute allowing for the imposition of the death penalty is not arbitrarily applied; and to insure that all members of society cannot be twice placed in jeopardy for the same offense. And to return for resentencing would be to place a defendant twice in jeopardy. The statute thus prevents such double jeopardy and protects us all.

Additionally, even if we assume a remand for a sentencing hearing would

not be double jeopardy, and even if we assume that this Court would be in agreement with the petitioner, at least in theory, this Court would be constrained to do no more than declare the statute to be unconstitutional, rather than to create a nonexisting right to proceed with a new sentencing proceeding such can only be done by Pennsylvania's legislature.

Finally, the petitioner argues that the Supreme Court of Pennsylvania in vacating the respondent's death sentence and remanding for the imposition of a life sentence, defeats the legislative intent of having a jury decide the penalty. If so, why did the legislature provide for remand for imposition of a life sentence after a death sentence is vacated when the statute was created, 42

Pa. C.S.A §9711(h)(3). The Court was following legislative intent by vacating the penalty and remanding for the imposition of a life sentence pursuant to 42 Pa. C.S.A. §9711(h)(3)(i) because it was determined that the sentence may have been a product of passion, or prejudice, or any other arbitrary factor. The potential existed for arbitrary application without a definition of the statute.

The Commonwealth's arguments that the survivors are denied due process or are the subject of invidious discrimination are without authority, challenge the imagination, and are not the subject of review for certiorari.

Any remand for a new sentencing hearing would be the creation of a new statute in Pennsylvania by this Court,

and then a retroactive application. Such is contrary to the functions of this Court (the highest Judiciary not the legislature).

Certiorari must be denied.

CONCLUSION

For the reasons outlined in the respondent's brief, the petitioner's petition for Writ of Certiorari should be denied. The Pennsylvania Supreme Court acted within its statutory authority by vacating the death sentence and remanding the respondent for imposition of the death penalty.

Additionally, for the reasons set forth hereinabove, the Constitutional issues are of no arguable merit.

Respectfully submitted,

by Dennis V. Williams
Dennis V. Williams

Dated: September 16, 1987